Denver Law Review

Volume 39 | Issue 6 Article 7

1962

Vol. 39, no. 6: Full Issue

Dicta Editorial Board

DICTA

VOLUME 39

1962

The Denver Bar Association

The Colorado Bar Association

The University of Denver College of Law

1962

dicta®

Volume XXXIX, No. 6 November-December, 1962
Published bi-monthly and copyrighted 1962 by the Denver Bar Association, the Colorado Bar Association and the University of Denver College of Law.

Member National Conference of Law Reviews.

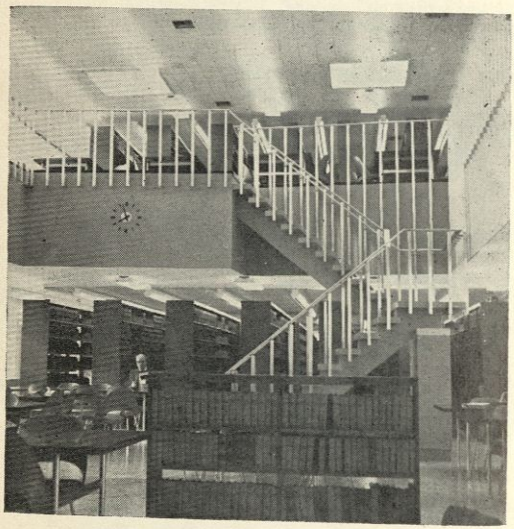
ADVERTISING AGENT: *DICTA* Advertiser, College of Law, 200 West 14th Avenue, Denver 4, Colo., ALpine 5-3441, ext. 644.

SUBSCRIPTIONS AND CONTRIBUTIONS: Mail contributions or orders for subscriptions or back issues to *DICTA* Business Editor, University of Denver College of Law, 200 West 14th Avenue, Denver 4, Colorado. $1.00 per copy, $5.00 per year, $6.50 per year outside United States. Draw checks payable to *"DICTA."*

A beautiful library for
research and professional use,

The Westminster Law Library of The University of Denver College of Law

serving the needs
of students, lawyers, and judges.



We solicit the support of members of the bar and all persons interested in the College of Law and in the service to the public rendered by the University of Denver.

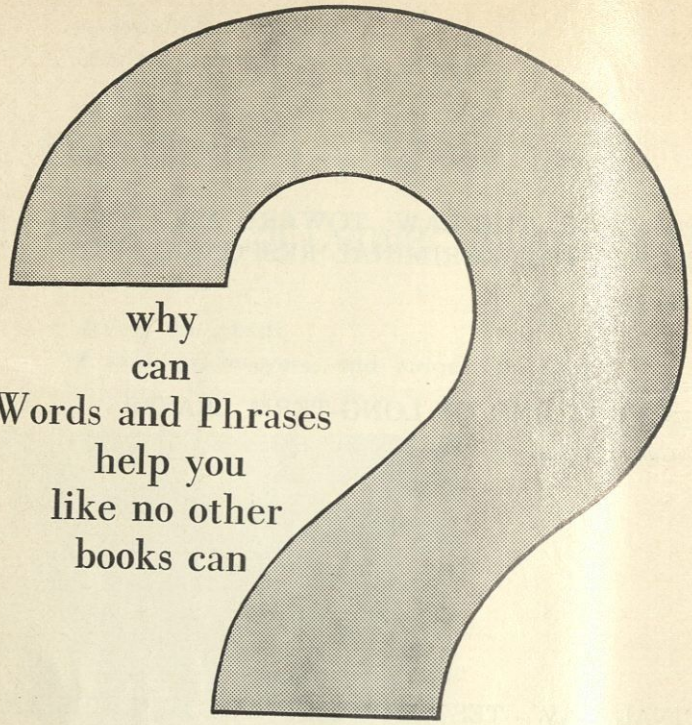
Women's Library Committee
of the University of Denver Law Library

The Women's Library Committee invites your help in developing the resources of the Westminster Law Library of the University of Denver College of Law. Your gifts of money and books will be used to improve the many library services.

CONTENTS

CASE COMMENT

BAR BRIEFS



Because WORDS AND PHRASES classifies the law by *words* and *phrases* rather than *topics* or *principles* of law.

WORDS AND PHRASES presents no problem of determining *topic* classification. The Words and Phrases research method cuts across the entire field of law and like a magnet picks out only those cases construing the word or phrase in question.

Consider the doctrine of "last clear chance"—properly classified under a number of topics (such as automobiles, carriers, collision, railroads, etc.). With WORDS AND PHRASES you just turn to "last clear chance." Nothing could be simpler!

Ask for further information

WEST PUBLISHING CO.
St. Paul 2, Minn.

INSANITY AND THE LAW:

TOWARD A RATIONAL DEVELOPMENT OF CRIMINAL RESPONSIBILITY

BY FRED COHEN*

I. INTRODUCTION**

> Statutes were framed and principles of law laid down regulating the legal relations of the Insane long before physicians had obtained any accurate notions respecting their malady; and, as might naturally be expected, error and injustice have been committed to an incalculable extent under the sacred name of law.
>
> — Isaac Ray, 1838

What Isaac Ray said over one hundred and fourteen years ago could be said with equal validity today. Psychiatry has advanced far beyond its primitive state at the time Isaac Ray wrote. Yet criminal justice continues as an autonomous system of supernatural concepts which cannot be defined in terms of experience.

The defense of insanity is but a part of the overriding problems which the entire body of criminal law presents. It is, however, a dramatic focal point for those problems and thus merits separate attention in a nation which is sceptical of drastic changes in existing institutions.

The defense of insanity in criminal cases is dealt with here within the larger framework of the concept of criminal responsibility. It was also felt that the existing case law and legislation in the area should be articulated and analyzed. Colorado cases and statutes have been emphasized to provide comprehensive coverage for at least one state, although "the law" in other jurisdictions is frequently referred to when necessary. Colorado has long been a leader in enacting progressive rules and procedures for the mentally ill. It is hoped that a climate which is receptive to objective appraisal and enactment of needed revisions will continue to exist. Colorado, Denver in particular, has recently been subjected to a torrent of newspaper publicity concerning the defense of insanity. An objective statement of the existing situation appears to be needed.

Articulation of existing law and procedure serves as a framework for the more important task of proposing reforms. This dual purpose has, no doubt, contributed to the "unevenness" of the article. The legal idiom, so necessary to the summary and analysis of the law, is often inadequate when one attempts to go beyond its boundaries in search of methodology, data and solutions. When necessary, the language of the law has been discarded in favor of the language of the behavioral sciences. If verbal precision has been sharpened, then no apologies will be necessary.

There is no attempt to restrict the inquiry to the rules of criminal irresponsibility, *i.e.*, insanity. We consider procedural im-

* Assistant Professor of Law, University of Denver Law Center.

** The author gratefully acknowledges the assistance and cooperation of the faculty, staff and student assistant, Gary Norton, of the University of Texas Law School where most of the research was done.

plementation of the rules, the concept of partial responsibility, mental disorder as a cause of delay in the criminal process and an approach to the rational development of criminal responsibility. The problems are complex and the solutions are illusive.

II. TESTS OF CRIMINAL RESPONSIBILITY

A. The Irresponsibility Decision

Insanity, as used in the phrases, "defense of insanity," or "plea of insanity," is a legal term descriptive of persons demonstrating such a grossly disordered mental condition that they are not amenable, *i.e.*, responsible, to the ordinary processes of the law.[1] Insanity and irresponsibility will be used here interchangeably.

Insanity, as a concept, lacks scientific precision or sanction.[2] It is a legal, not a medical, term and serves as a barrier to meaningful communication between the doctor and the lawyer.[3] We begin to apprehend reality if insanity is regarded as a label which the criminal law utilizes for manipulative purposes. Implicit in the concepts of sanity and insanity are the policy goals of criminal law—responsibility or irresponsibility.

Responsibility for one's conduct presently depends on whether the actor was of normal competence, capable of having the requisite *mens rea*.[4] The legal tag for normal competence is "sane." Insanity expresses just the opposite and characterizes a person as "not responsible to the law."

Not every unsoundness of mind will result in criminal irresponsibility. Most of the current polemics center about the "legal tests" of insanity.[5] What type and degree of mental disturbance will qualify as insanity? What is the most appropriate standard to use in making this decision?

In 1954, the Court of Appeals for the District of Columbia announced the momentous Durham rule.[6] That case has served to focus even more attention on the "legal tests" of insanity. Colorado, along with other jurisdictions, has not remained immune from the mounting dissatisfaction with current rules and procedures ignited by *Durham*.[7]

Although the literature is replete with proposals for new tests of insanity, the current authoritative tests are few. These are the M'Naghten Rules,[8] the M'Naghten Rules accompanied by the ir-

---

1 Brown v. People, 116 Colo. 93, 97, 178 P.2d 948, 950 (1947). "In a criminal case the question to be resolved is not in fact 'sane or insane?' As to what constitutes insanity the experts, as well as laymen, radically differ. The question is responsibility."

See also, The Mentally Disabled and the Law 347 (Lindman and McIntyre ed. 1961). Allen, *The Rule of the American Law Institute's Model Penal Code*, 45 Marq. L. Rev. 494 (1962).

The qualification "ordinary processes of the law" is used because a successful defense based on insanity, unlike any other defense, may still result in the individual's subjection to the restraining authority of the state.

2 Deutsch, The Mentally Ill in America 387 (2d ed. 1949).

3 Roche, The Criminal Mind 15 (Evergreen ed. 1959). Bauer, *Legal Responsibility and Mental Illness*, 37 Nw. U. L. Rev. 12 (1962).

4 Hall, General Principles of Criminal Law ch. XIII (2d ed. 1960). Biggs, The Guilty Mind (1955).

5 Weihofen, Mental Disorder as a Criminal Defense 50 (1954).

6 Durham v. U.S., 214 F.2d 862 (D.C.Cir. 1954).

7 See Castro v. People, 140 Colo. 493, 346 P.2d 1020 (1959); Early v. People, 142 Colo. 462, 352 P.2d 112 (1960).

8 10 Clark and Fin. 200, 8 Eng. Rep. 718 (1843).

"[T]he party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know what he was doing was wrong."

resistible impulse test (Colorado's position at least since 1915),[9] the New Hampshire or Durham "product" test,[10] the Currens test[11] and the American Law Institute's Model Penal Code.[12]

At the present time, the M'Naghten Rules alone, or supplemented by the irresistible impulse test, are the exclusive tests of criminal responsibility in the federal jurisdiction, except the Third Circuit and the District of Columbia, and in all states except Vermont, New Hampshire, Maine, Illinois and perhaps Montana.[13]

Not more than fourteen states have coupled irresistible impulse with M'Naghten.[14] Thus Colorado finds itself in rather limited company, especially when it is noted that Colorado's rule is statutory.[15] The M'Naghten Rules were created by the judiciary and the great majority of jurisdictions have adopted and maintained the rules through the judiciary. Colorado, having adopted the rules by legislation, is unique and presents different problems to those who seek change. It seems clear that any changes in the rule must come from the legislature. The Supreme Court of Colorado has flatly stated, "We hold that the test of criminal irresponsibility is for the General Assembly to determine and to change, if indeed it is to be changed."[16]

The irresistible impulse test has certainly not been above criticism. However, on this aspect of Colorado's present rules, we

---

9 Ryan v. People, 60 Colo. 425, 153 Pac. 756 (1915).

"[I]ncapable of distinguishing right from wrong . . . incapable of choosing the right and refraining from doing the wrong. And this is true howsoever such insanity may be manifested by insane delusions . . . , by irresistible impulse, or otherwise."

10 State v. Pike, 49 N.H. 399, 6 Am. Rep. 533 (1869); State v. Jones, 50 N.H. 369, 9 Am. Rep. 242 (1871); Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954).

"[I]f his unlawful act was the product of mental disease or mental defect."

See Reid, *Understanding the New Hampshire Doctrine*, 69 Yale L. J. 367 (1960) for a discussion of the distinction between the two rules.

11 United States v. Currens, 290 F.2d 751 (3d Cir. 1961). This test is similar to the Model Penal Code: "[T]he defendant as a result of mental disease or defect, lacked substantial capacity to conform his conduct to the requirements of the law which he is alleged to have violated."

12 §4.01 (Proposed official draft, 1962). [Hereinafter cited, Model Penal Code].

"(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.

"(2) [T]he terms mental disease or defect do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct."

Adopted with revisions, in Vermont and Illinois. Vt. Stat. Ann. Tit. 13 §4801 (1959); Ill. Stat. Ann. ch. 38 §6-2 (1961 Supp.). Also see Me. Rev. Stat. Ann. ch. 149 §38-A (1961 Supp.).

13 See note 10 *supra* for the D.C. and New Hampshire tests. The Montana Supreme Court has wavered between the irresistible impulse test, State v. Peel, 23 Mont. 358, 59 Pac. 169 (1899), the product test, State v. Keerl, 29 Mont. 508, 75 Pac. 362 (1904) and a test of ability to form the requisite intent, State v. Narich, 92 Mont. 17, 9 P.2d 477 (1932). See Note, *Insanity as a Defense in the Criminal Law of Montana*, 1 Mont. L. Rev. 69 (1940).

See also Deutsch, The Mentally Ill In America 396 *et. seq.* (2d ed. 1949); The Mentally Disabled And The Law 332 (Lindman and McIntyre ed. 1961); Weihofen, Mental Disorder as a Criminal Defense 68 *et. seq.* (1954).

14 Alabama, Arkansas, Colorado, Connecticut, Delaware, Indiana, Kentucky, Massachusetts, Michgan, New Mexico, Utah, Virginia and Wyoming. Georgia has a delusional-impulse test.

See Perkins, Criminal Law 762 (1957).

15 Colo. Rev. Stat. § 39-8-1(2) (1953).

"The applicable test of insanity in such cases shall be, and the jury shall be so instructed: 'A person who is so diseased in mind at the time of the act as to be *incapable of distinguishing right from wrong* with respect to that act, or being able to so distinguish, has suffered such an impairment of mind by disease as to destroy the will power and render him incapable of choosing the right and refraining from doing the wrong, is not accountable; and this is true howsoever such insanity may be manifested, whether by *irresistible impulse* or otherwise. But care should be taken not to confuse such mental disease with moral obliquity, mental depravity, or passion growing out of anger, revenge, hatred or other motives, and kindred evil conditions, for when the act is induced by any of these causes the person is accountable to law." (Emphasis added.)

This has been the statutory test since 1927 and is identical to the *Ryan* formulation. See note 9 *supra*.

16 Castro v. People, 140 Colo. 493, 509, 346 P.2d 1020, 1029 (1959).

find most of the better criticism directed to a scepticism concerning reasons for *rejection* of the rule.[17]

"Very rarely, if ever, has any rule of law been so extravagantly and caustically censured as the 'right and wrong' test of M'Naghten's Case."[18] The most cogent criticism of the M'Naghten Rules is that they fail to effectuate a major policy goal of the criminal law. They fail to aid in identifying those who are so mentally disordered as not to be properly responsible to the ordinary criminal process.[19] Consequently, the criminal law finds itself punishing those whose punishment is of no positive aid to society. To demonstrate this is perhaps to prove the entire case against the M'Naghten "right or wrong" formulation.

For many reasons the criminal law, indeed society, is not ready to accept the view that all criminal behavior is a symptom of mental illness requiring custody, care and treatment for the actor rather than punishment.[20] However, the law early accepted the view that there are those who manifest such gross mental abnormality that this condition ought to be a complete defense to a criminal charge.[21] The problem then is not agreeing on whether a principle of criminal irresponsibility based on mental disorder exists. On this point everyone agrees. The problem is the utility of the M'Naghten formulation as an aid to decision-makers in selecting the proper persons under this principle.

Concepts of "right or wrong" are said to belong to ethics.[22] This criticism appears to have validity when we consider the experts' role in the courtroom. When the psychiatrist is asked if the accused knew the difference between right and wrong, it seems obvious that he is being asked to measure the accused by some ethical, rather than medical, standard. The doctor is no more professionally prepared to state ethical judgments than the other courtroom participants.

Weihofen criticizes the ethical component of M'Naghten because of the ephemeral nature of ethical beliefs and the difficulty of knowing right from wrong in the complex conflict-culture of our time.[23] This is a questionable basis for criticism. The entire body of criminal law bears some imperfect relation to the community's ethical beliefs. As such, it is subject to the problems of change in-

---

17 Weihofen, note 13 *supra* at 94; Guttmacher and Weihofen, Psychiatry And The Law 408, 409 (1952).

"The view that certain impulses which result from mental disorder may be 'irresistible' has formidable medical support. Opinions contrary to this view are held by 'relatively few members of the profession.'" The Mentally Disabled and the Law 340 (Lindman and McIntyre ed. 1961) and authorities cited therein.

Keedy, *Irresistible Impulse as a Defense in the Criminal Law*, 100 U. Pa. L. Rev. 956 (1952). Wertham, The Show Of Violence 13-14 (1949) is the most outspoken *medical* critic of the rule.

18 Harno, *Some Significant Developments in Criminal Law and Procedure in the Last Century*, 42 J. Crim. L., C. & P.S. 427, 433 (1951).

See Weihofen, note 13 *supra* at 65, n.36 (1954) for "a few of the numberless books and articles discussing the M'Naghten case rules."

19 Guttmacher and Weihofen, *op. cit. supra* note 17, at 420. This same notion, stated in varying forms, may be found in many sources. But see Hall, General Principles of Criminal Law 481 (2d ed. 1960) and State v. White, 374 P.2d 942 (Wash. 1962) for an affirmation of the M'Naghten rules.

20 One reason is the great shortage of personnel in public mental hospitals throughout the country. The American Psychiatric Association's survey, in 1956, revealed a critical nationwide need for 63,344 employees including physicians, psychologists, registered nurses, other nurses, attendants and social workers. N.Y. Times, Dec. 27, 1957, p. 38, Col. 1 quoted in Donnelly, Goldstein and Schwartz, Criminal Law 59 (1962).

21 "By Edward III's reign, 1326 to 1327, complete *madness* was a defense to a criminal charge. Until then at least, the insane criminal's life could be saved only by the pardon of the king." Biggs, The Guilty Mind 83 (1955).

22 Weihofen, *op. cit. supra* note 13, at 65; Guttmacher and Weihofen, *op. cit. supra* note 17, at 406.

23 Weihofen, *op. cit. supra* note 13, at 65-66.

herent in any dynamic system. A major problem for criminal law is its failure to keep pace with changes in community sentiment and achieve a balance between this sentiment and objectively determined policy goals.[24] The M'Naghten Rules, as an ethical statement, must endure only that amount of criticism which is directed to the whole of criminal law.

When Daniel M'Naghten shot and killed Drummond, private secretary to Sir Robert Peel, he believed that he was killing Peel. M'Naghten had delusions of persecution and believed that Peel was one of his enemies. The excitement engendered upon his acquittal by reason of insanity led to debate in the House of Lords and ultimately to the now famous advisory opinion of the Judges of England.

M'Naghten is thought to have been a paranoiac who suffered from delusions.[25] Consequently, the questions that were framed and the Judges' responses were primarily concerned with "delusional insanity." There is good reason to believe that the Judges never intended their formulation to encompass cases of mental disorder other than those manifested by delusions.[26]

In amplification of the "right and wrong" test, the Judges stated further that,

> Where a person 'labours under partial delusions only and is not in other respects insane,' and commits an offense in consequence thereof, 'he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real.'[27]

The fallacy of determining the criminality of conduct by standards applicable to normal persons was early perceived in Colorado. The *Ryan*[28] case was the first to consider the partial delusion aspect of M'Naghten and it was firmly rejected. The jury had been instructed in almost the identical terms of M'Naghten and the defendant objected. The supreme court found that the jury could scarcely have failed to be misled since Ryan's delusions would not have been a justification for the killing if his apprehensions were based on fact.[29] Retreating somewhat, the court indicated that the instruction need not always constitute prejudicial error but "in such case it has no application, states a wrong principle of law, and should not be given."[30]

Any uncertainty about possible nonprejudicial situations was removed the next year. The *Oldham*[31] case involved the same instruction and the same delusional situation, the delusion not being a defense to a killing if real. The court conceded that nonprejudicial error was possible, "but as it embodies an incorrect legal principle, it ought not to be given at all."[32] Thus, from "should not be given" to "ought not be given at all," we read the short Colorado history of the M'Naghten Rules on partial delusion and their epitaph.

---

24 Rose and Prell, *Does The Punishment Fit the Crime?* 61 Amer. J. of Soc. 247 (1955).
25 Weihofen, *op. cit. supra* note 13, at 64.
26 Glueck, Mental Disorder and the Criminal Law 166 (1925).
27 As set out in Weihofen, *op. cit. supra* note 13, at 62.
28 Ryan v. People, 60 Colo. 425, 153 Pac. 756 (1915).
29 *Id.* at 427-28, 153 Pac. at 757.
30 *Id.* at 428, 153 Pac. at 757.
31 Oldham v. People, 61 Colo. 413, 158 Pac. 148 (1916).
32 *Id.* at 415, 158 Pac. at 149.

In rejecting the "partial delusion test," however, Colorado did not necessarily free itself from criticism that the "right and wrong" formulation itself was to deal only with delusional insanity. The first question posed for the Judges asked for the law respecting crimes committed under insane delusions. The Judges replied that such a person was responsible, "if he knew at the time of committing such crime that he was acting contrary to law . . . the law of the land."[33]

How the partial and "complete" delusion rules were intended to operate is not clear. It is clear that Colorado has rejected the partial insanity test.[34] To the extent that the "right and wrong" test itself was intended to deal only with delusions and not other types of mental illness, Colorado perpetuates the error. The test is used to cover any symptomatic mental disorder.

> The M'Naghten test is based on an entirely obsolete and misleading conception of the nature of insanity, since insanity does not only, or primarily, affect the cognitive or intellectual faculties, but affects the whole personality of the patient, including both the will and the emotions. An insane person may therefore often know the nature and quality of his act and that it is wrong and forbidden by law, but yet commit it as a result of the mental disease.[35]

Underlying this statement are several separate, yet intimately related, criticisms of M'Naghten. The test is medically unsound by overvaluation of the intellectual factor. Modern psychology views the personality as an integrated whole. The M'Naghten test was formulated in the days of faculty psychology, which divided the mind into neat little autonomous compartments. A defect in one compartment was thought not to affect any other. This view has long since been abandoned in favor of the integration of the principal functions of personality. The M'Naghten test virtually ignores the emotions (affect) and volition.[36] This tends to freeze the law in a rigid, nondynamic mold incapable of adjusting to advances in psychological theory.[37]

The word *wrong* as used in the test is ambiguous. Does it mean legal wrong, or moral wrong? Not many cases actually discuss the

---

33 M'Naghten's Case, 10 Clark and Fin. 200, 209, 8 Eng. Rep. 718, 722 (1843).

34 "In all such cases the controlling question is the sanity or insanity of the accused with respect to the act, and upon trial of this issue there is, in legal contemplation, no middle ground, the defendant is either sane or insane . . . . " Ryan v. People, 60 Colo. 425, 429, 153 Pac. 756, 758 (1915).

35 Royal Commission on Capital Punishment 1949-53, *Report*, Cmd., No. 8932 at 80 (1953).

36 "The M'Naghten rule has no medical or scientific application except as noted for the infrequent case of disturbed consciousness which is mere coincidence." Roche, The Criminal Mind 102 (Evergreen ed. 1959). Dr. Roche also points out that, "The determination of capacity for knowledge in one accused of crime is neither science nor art . . . . [I]t is a moral inquiry between the accused and a psychiatrist . . . . " *Id.* at 111.

The proponents of M'Naghten will concede the validity of the "integration of personality" thesis. See Cavanagh, *Problems of a Psychiatrist in Operating Under the M'Naghten, Durham and Model Penal Code Rules*, 45 Marq. L. Rev. 478 (1962). Dr. Cavanagh, however, believes that intelligence and ethical values are more easily measured than affect, imagination or will.

Hall, General Principles of Criminal Law 521 (2d ed. 1960). See Biggs, The Guilty Mind (1955) for an excellent historical background.

37 Mr. Justice Frankfurter, before the Royal Commission on Capital Punishment stated in part: "The M'Naghten Rules were rules which the Judges, in response to questions by the House of Lords, formulated in the light of the then existing psychological knowledge . . . . I do not see why the rules of law should be arrested at the state of psychological knowledge of the time when they were formulated . . . . " Quoted by Judge Biggs in United States v. Currens, 290 F.2d 751, 765 (3d Cir. 1961).

point.[38] Most courts use the word *wrong* without defining it. A few courts hold it to mean moral wrong; a larger number of cases decide it means legal and moral wrong; still others confine it to legal wrong.[39] To understate the matter, the definitional problem is in a state of hopeless confusion.

It is difficult to be certain how Colorado views the word *wrong*. The *DeRinzie* case involved an instruction which defined insanity in a general way (apparently "right from wrong") and also stated:

> That if the defendant was incapable of understanding, at the time the act was committed, that it was wrong, and that it was a violation of the law of God and society, he should be acquitted.[40]

The defendant complained that his trial for burglary and larceny was for a violation of a law of Colorado and no other law. The opinion, which reads more like a sermon, upheld the charge since "it was only equivalent to saying that if his poor mind could not understand that he was committing a wrong he should be allowed to go. . . ."[41]

The court, inferentially, found no difference between "the divine injunction thou shalt not steal" and the criminal code. Does this place Colorado among the jurisdictions holding *wrong* to mean legal and moral wrong? The answer is certainly not clear and perhaps not very important. The Colorado statute directs the court to instruct the jury in terms of the statute.[42] Thus the *DeRinzie* situation is unlikely to reoccur. The problem could arise where a person knew the act was a crime and would subject him to punishment but he committed it because he was under a delusion that he was divinely commanded to save society by sacrificing his own life. This person is responsible if *wrong* is confined to legal wrong and irresponsible if it is confined to moral wrong.[43]

Colorado's early acknowledgement of irresistible impulse as a defense deflects some of the criticism directed to the M'Naghten Rules. The defense takes *volition* into account. However, as Judge Bazelon points out in *Durham*, it is also inadequate "in that it gives no recognition to mental illness characterized by brooding and reflection and so relegates acts caused by such illness to the application of the inadequate right-wrong test."[44]

Even if it be conceded that the addition of irresistible impulse adds the concept of volition to cognition, the emotions are still neglected. But the simple expedient of adding another symptom to the legal test should not satisfy the thoughtful critic. The fundamental objection is not that criminal irresponsibility is made to rest upon an inadequate, invalid or indeterminable symptom or

38 People v. Schmidt, 216 N.Y. 324, 110 N.E. 945 (1915) is one of the few. Judge, later Justice, Cardozo concluded it meant moral wrong.
Weihofen, *op. cit. supra* note 13, at 77 states "The Opinion of the Judge [*sic*] is so confusing on this point it seems impossible to determine in what sense the word 'wrong' was there used."
39 See Weihofen, *op. cit. supra* note 13, at 78-79 for numerous citations.
40 De Rinzie v. People, 56 Colo. 249, 250, 138 Pac. 1009 (1914).
41 *Id.* at 250-51, 138 Pac. at 1010.
42 See note 15 *supra*.
43 Moral knowledge could be further refined to a "right knowledge" of moral precepts. This would render the situation even more hopeless. In London Guarantee & Acc. Co. v. Officer, 78 Colo. 441, 446, 242 Pac. 989, 991 (1926), the court said: "[N]evertheless he may not be held accountable if affected with a mental derangement which precludes any conception of the moral and legal aspects of the killing . . . . " This was a civil action and the above quotation would be merely *dictum* in a criminal case.
44 Durham v. United States, 214 F.2d 862, 874 (D.C. Cir. 1954).

manifestation, but that it is made to rest upon *any* particular symptom.[45]

Our fundamental question remains. Do the M'Naghten Rules, as supplemented by the irresistible impulse test, aid decision-makers in identifying those who are so mentally disordered that they ought not be responsible to the ordinary criminal processes?

The criminal law provides the state with an imposing arsenal of official sanctions. The state can deprive a *criminal* of liberty, life, property and respect. The unofficial sanctions which accompany a designation of *criminal* or *ex-convict* may be more devastating than the official sanctions. The moral condemnation which is an integral part of the designation "criminal" places a stigma on a person which may alter his relations with the community for all time.

Calling attention to these *possibilities* should silence those who maintain that an automatic commitment to a mental hospital as insane (irresponsible) is difficult to distinguish from a prison sentence as sane (responsible).

The inescapable fact is that our mental institutions contain many patients who suffer from serious mental illness and who know the difference between right and wrong.[46] It would be impossible to have order and control in a mental institution if the patients did not *know* and follow some minimal rules of conduct.

How can one determine whether the accused has knowledge of right and wrong? Dr. Roche states that the only direct way is to put the question to him. He points out that many psychotics have a hypertrophied sense of right and wrong which characterizes their illness. So, if a mentally-ill accused answers hypotheticals indicating he knows right from wrong, or states that his own crime was wrong, he invites his own undoing.[47] The only warranted conclusion, however, is that the accused can, or cannot, know right from wrong *on a verbal level.* This is not a clinical reality.

Whether viewed as an unsophisticated attempt to define psychotic, or isolate non-deterrables, our current rules fail of their purpose. Mental illness per se need not be synonymous with insanity to satisfy the law's manipulative purposes. Surely serious mental illness, *e.g.,* serious enough to require involuntary commitment in a mental hospital, should be sufficient to result in a finding of criminal irresponsibility. Since Colorado, along with most states, automatically commits an insane defendant, the issue is not total freedom *vs.* incarceration.[48] It is manipulation into a punitive, nonrehabilitative setting *vs.* manipulation into a nonpunitive, rehabilitative setting.

In stressing the cognitive and part of the volitional aspects of personality, over one hundred years of psychological advancement is in large measure excluded.[49] Persons suffering from serious

45 *Id.* at 872.
46 United States v. Currens, 290 F.2d 751, 765 (3d Cir. 1961).
47 Roche, The Criminal Mind 109 (Evergreen ed. 1959).
48 Colo. Rev. Stat. §39-8-4(2) (Supp. 1960). "If the verdict is that the defendant was insane at the time the alleged offense was committed the judge shall forthwith commit him to the State Hospital at Pueblo . . . . "
49 Judge Biggs points out that the substance of the M'Naghten Rules is not 119 years old but 375 years old. The right and wrong test is set out in a book by William Lombard of Lincolns Inn, Eirnarcha, 1582. See United States v. Currens, 290 F.2d 751, 764 (3d Cir. 1961).

mental illness may not come within the operation of the rules.[50] The verbal formulation of the tests suffers from ambiguities and leaves the trier hopelessly uninformed.[51] By stating the test of legal responsibility in terms of any symptom—and impaired intellect and volition are inadequate symptoms alone—the law rejects the universally accepted theory of the integration of personality.

Some commentators cite Colorado courts as being very liberal with the psychiatrist in allowing him to communicate the total psychological picture of the accused to the jury. This is said to avoid some of the rigors of M'Naghten. To a similar contention Mr. Justice Frankfurter said, "I think the M'Naghten Rules are very difficult for conscientious people and not difficult enough for people who say, 'We'll just juggle them'. . . ."[52]

Colorado, Denver in particular, has recently been the focus of a great deal of public debate concerning the defense of insanity. The newspapers have given widespread coverage to several dramatic cases and initiated a "campaign" to correct defects in the law. When the sensational aspects of the reporting are trimmed away, the complaint would seem to be that the plea is entered and successful too often.[53]

One of the most thoughtful public statements came from a woman juror who served on a case where the accused was found not guilty by reason of insanity. She decried the lack of dignity in the proceedings, the communication barriers and the jury's inability to reach a rational decision.[54] This is to be contrasted with a typically facile statement that this is, "one of the major problems facing our society."[55] Obviously, we have a problem. What are the true dimensions of the problem? How can we reach a rational solution?

A recent unpublished study casts some new light on part of Colorado's problem in this area. This study covered all the criminal indictments and informations for murder, burglary, larceny, forgery and rape filed in the District Criminal Court (Divisions 8, 9, and 10) for the City and County of Denver, for the years 1957 through 1961.[56] Statistics were collected to indicate the number of charges, the number of insanity pleas entered, how often the plea was withdrawn prior to trial, the frequency of insanity being submitted to the jury and the frequency of success.

---

50 Several Denver psychiatrists recently stated that not more than one in a hundred patients at the State Hospital in Pueblo could meet the right and wrong test. Unreported testimony given in a hearing in the Denver District Court before Judge Neil Horan, People v. French (1962).

51 The problem of expert and non-exeprt testimony is taken up at p. 347 *infra*.

52 Testimony before The Royal Commission on Capital Punishment, quoted in United States v. Currens, 290 F.2d 751, 766 (3d Cir. 1961).

53 Denver Post, Aug. 5, 1962, §AA, p. 1, col. 1. The article refers to the cases of Daniel Lee French, Alfred Ratzloff, Joseph Scheer, Raymond Patton and others.

54 Rocky Mountain News, June 14, 1962, p. 47, col. 4. This appears in a column by Pasquale Marranzino who is to be commended for his reporting of this problem. The case involved Daniel Lee French who was accused of raping several Denver women. This writer served as co-counsel for French with Walter L. Gerash of the Denver Bar.

55 This phraseology is perhaps suitable in a political campaign but is obviously of no utility in formulating the issues.

56 Smeltzer, *Insanity as a Defense in Murder and Lesser Crimes* (1962). Unpublished manuscript on file at the University of Denver, College of Law Library. The writer is indebted to George Smeltzer, student at the University of Denver, College of Law, for his efforts and permission to use these figures. The actual data were compiled from the Docket Fee Book and Register, book numbers: 71 through 83. The figures are based on the number of indictments or informations and not the number of actual cases. For example, a single case may involve several defendants and several counts of larceny and larceny by bailee. This was counted as a single case of larcency. The study was completed Sept. 1, 1962.

The murder figures for the five year period indicate 121 charges, 41 insanity pleas, 14 withdrawals prior to trial, 27 cases of submission of the plea to the jury and 21 findings of insanity and commitment to the hospital. This means that approximately 78% of the cases reaching the jury result in a finding of insanity.

The withdrawals of the plea probably are largely determined by the results of the automatic commitment and observation aspect of the Colorado statute.[57] In addition, if an accused is not financially able to hire his own psychiatrists or hires psychiatrists who believe him to be sane, he is likely to withdraw the plea. Thus, as startling as the jury success figures appear, they must be modified by these factors which do not appear as part of the statistical study.

In relation to the number of charges filed, the plea was successful about 17% of the time. The plea was entered in about 34% of the cases although, as noted, frequently withdrawn.

Most commentators assume that the plea of insanity is almost exclusively confined to homicide cases.[58] This study tends to bear out the statement. The plea was entered about 34% of the time in murder cases and this far surpassed the other crimes studied.[59] Almost every case reaching the Supreme Court of Colorado, since 1915, involving a point about insanity was a murder case, and usually first-degree murder.

In relation to the number of charges filed, the insanity plea has been successful in 2.8% of the rape cases; larceny, 1.1%; burglary, 1.9%; and forgery, 1.4.% In every category there was a 50% chance or better of an insanity verdict if the case went to the jury.[60]

These figures would seem to completely invalidate the charges concerning the frequency and success of the plea.[61] Trial attorneys should not hastily conclude that they have an excellent chance of getting a verdict of insanity if they go to the jury. It is almost certain that success at that stage is, in large measure, related to available psychiatric opinion. To discredit the newspaper attack on the law is not also to state that the law is satisfactory. In fact, the relative infrequency of success lends credence to the thesis that the existing rules are not an effective aid in identifying the person with serious mental illness.

B. The Commitment-Treatment Decision

From a legal perspective, a finding of "not guilty by reason of insanity" means that the accused was and is not responsible for the conduct in question. Unlike any other successful defense to a criminal charge, a verdict of insanity will still subject the person to involuntary confinement.

The Colorado statute provides that the defendant shall be forthwith committed to the State Hospital at Pueblo.[62] Although the point never seems to have been articulated in Colorado, a verdict of insanity at the time of the commission of the act must

57 Colo. Rev. Stat. §39-8-2 (Supp. 1961). Subsections (1) and (4) amended by Colo. Sess. Laws 1962, ch. 45, §1.

58 See, e.g., Roche, The Criminal Mind 91 (Evergreen ed. 1959).

59 In relation to the total number of charges, the insanity plea was entered in 7.3% of the rape cases, 5.4% of the larceny cases, 6.8% of the burglary cases and 10.7% of the forgery cases.

60 100% for rape (4 cases in the 5 year period). 78% for burglary (23 cases). 88% for larceny (15 cases). 50% for forgery (5 cases).

61 The entire compilation of statistics from this study appears in the appendix.

62 Colo. Rev. Stat. §39-8-4(2) (Supp. 1960).

carry with it a presumption that the insanity continues. If it did not, the accused would seem to be entitled to a hearing on his present sanity.[63] There would be grave constitutional questions posed in institutionalizing, without a hearing, a now sane person who has been found criminally irresponsible.

In twenty-nine jurisdictions it is mandatory that hospitalization follow such acquittal. In twenty states hospitalization is discretionary, and three provide for a special procedure.[64]

It is entirely proper that a person who has committed a serious antisocial act, for which he is not criminally responsible, should be required to submit to custody, care and treatment. Sophisticated legal reasoning need not obscure the social fact of manifested danger to the community. The commission of socially harmful acts, regardless of mental condition, is a sufficient basis for confinement and treatment. Confinement without the availability and use of medical treatment, however, would be a perversion of the entire insanity defense.

Daniel Lee French was recently found not guilty of rape by reason of insanity. Denver District Judge Neil Horan requested the Governor to transfer him to the State Penitentiary "for security reasons."[65] The Governor complied with the request. Conceding the executive power to do this, one is still at a loss to explain the seemingly superfluous separate sanity trial. The availability of psychiatric help is extremely limited at the penitentiary. A verdict of irresponsibility is turned into prison confinement on the suggestion of a judge and the power of an executive order.[66]

The Supreme Court of Colorado has held that, "One who is insane when he commits an act prohibited by law cannot be held guilty of a crime. A statute providing that insanity shall be no defense to a criminal charge would be unconstitutional."[67] If some of the punitive aspects of criminal responsibility can be invoked on the *ex parte* decision of elected officials, the constitutional protection is little more than a slogan.

C. *The Criminal Process Delay Decision*

1. THE TESTS

a. Trial—The mental condition of an accused will result in criminal irresponsibility only if he was *insane* at the time of the commission of the act. Mental condition, however, is legally relevant for other decisions at four other time periods: (1) before or at trial, (2) sentencing, (3) execution of the death sentence, and (4) appeal.

The Colorado statute, in accordance with the common law rule, will not require an accused to stand trial if he is presently *insane*.[68]

---

63 *In re* Dowdell, 169 Mass. 387, 47 N.E. 1033 (1897).

64 The Mentally Disabled and the Law, Table XI-A, at 373-82 (Lindman & McIntyre ed. 1961) provides a reference to the procedure in all the states. The figures quoted are from this source.

65 Rocky Mountain News, June 8, 1962, p. 10, col. 1.

66 The *French* case has other aspects which are difficult to grasp. The district attorney decided to prosecute the accused for a rape which occurred shortly before the rape at issue in the sanity trial. Apparently the prosecutor's office believes it has the power to continue going back in time, when a series of crimes are involved, and force the defendant into successive sanity trials. The presumption of continuing insanity would seem to preclude trial until the defendant has recovered. If this procedure is upheld, the constitutionality of the automatic commitment procedure becomes a very urgent question.

67 Ingles v. People, 92 Colo. 518, 522, 22 P.2d 1109, 1111 (1933).

68 Colo. Rev. Stat. §39-8-6(1) (1953). "A person charged with the commission of a felony or a misdemeanor who becomes insane after such commission shall not be tried for the offense while his insanity continues . . . ."

The statutory language seems broad enough to not require an accused to plead to an indictment or information if presently *insane.*

Several policy goals of the criminal law are furthered by requiring some minimal mental competence at the time of trial. The accused must be able to rationally assist counsel in the preparation and defense of his case. He should be able to comprehend the nature of the proceedings in order to play an intelligent part in this public drama involving the conflict between "good and evil."[69] Notions of humanitarianism dictate that we avoid the public spectacle of fixing guilt on a bewildered, disorganized defendant. We require him to be as mentally alert as his natural endowments permit in order to compete on equal terms with his accusers.

The test for determining sanity at the time of trial is:

> . . . The defendant is not to be considered as insane if he has sufficient intelligence to understand the nature and object of the proceeding against him and to rightly comprehend his own condition with reference to such proceeding . . . and has sufficient mind to conduct his defense in a rational and reasonable manner, although on some other subjects his mind may be deranged or unsound.[70]

Contrary to the tests for criminal irresponsibility, every state, except Washington which applies the common law, appears to legislatively define the test for delay of the criminal process.

In thirty-four jurisdictions the state of mind required is that of *insanity.*[71] In some of these states insanity is equated with the test for criminal irresponsibility, while in others, as in Colorado, insanity is descriptive of alternative mental conditions.[72] Seventeen states use the term "mentally defective" or its equivalent in the statutory definition.[73]

The Colorado test indicates a legislative awareness of the different role that mental condition plays throughout the criminal process. It is directed to an inquiry almost solely related to the cognitive aspect of the personality. The criticisms directed to the "right and wrong" formulation as a test for criminal irresponsibility are not as relevent here. The defendant, and society, have good reason to require an expeditious decision. If proper changes are made in disposing of the responsibility question, the medical and semantical problems at this point will vanish.

b. *Sentence*—If the accused becomes *insane* after a verdict of guilty but before sentence is pronounced the judge must delay imposition of sentence. This was the rule at common law and, with variations, is still universally accepted.[74]

The time between verdict and sentence is most important. Matters are being considered which may weigh heavily in the court's sentence. Since American jurisprudence rarely makes provision for sentence review, it is imperative that the accused have

---

69 Roche, The Criminal Mind 67 (Evergreen ed. 1959).

70 Colo. Rev. Stat. §39-8-6(8) (1953).

71 The Mentally Disabled and the Law, Table XI-B, at 386-94 (Lindman & McIntyre ed. 1961).

72 *Ibid.*

73 *Ibid.*

74 Weihofen, Mental Disorder As A Criminal Defense 459 (1954).

an opportunity to intelligently and rationally assist in the presentation of data to the court.[75]

In Colorado, the defendant has a right to make a statement in his own behalf and to present information in mitigation of punishment.[76] The same is true in the federal jurisdiction.[77] The usual safeguards surrounding a trial are not constitutionally required after a verdict of guilty. There is no right of confrontation or cross-examination, and hearsay rules are unavailing.[78] This makes it very important that the defendant be able to explain some of the items offered against him and assist in presenting mitigating evidence.

The Colorado statute reads:

> . . . The defendant is not to be considered as insane if he has sufficient intelligence to understand the nature of the proceeding against him, the charge of which he has been convicted, and the nature and extent of the possible punishment that may be administered to him, and has sufficient mind to know of any facts which might tend to mitigate his offense and to communicate such facts to his atttorney or to the court.[79]

Colorado, with most jurisdictions, requires that the defendant be able to *appreciate* the potential punishment. The underlying reason is probably a belief that the deterrent value of punishment is minimized unless there is an appreciation of its nature. This represents a rather naive understanding of the psychological variations present in humans.[80] A complete psychological abstract of the defendant would have to be available before a judge would be certain of the deterrent value of any sentence.

c. *Execution*—In an exquisite display of compassion, the law will not permit an insane person to be executed. Thurmond Arnold uses this legal curiosity to illustrate "how conflicting rational and moral principles condition the behavior of civilized institutions, just as taboos condition the behavior of savage institutions."[81]

Whereas many authorities believe that constitutional protection surrounds the right not to be tried or sentenced while insane, delay of execution is held to be a matter of grace and not of right.[82] If suspension of execution is a matter of grace, then the condemned man has no argument about the procedural implementation of the rule.[83]

The common law made no provision for delaying execution of sentence because of insanity when the punishment was less than death.[84] This is the contemporary view and most jurisdictions will simply transfer a mentally ill person from a penal to a mental institution. The principle reason for the rule appears to be that

---

75 United States v. Wiley, 184 F. Supp. 679 (N.D. Ill. 1960). Connecticut has a sentence review division of the Superior Court.

76 Colo. R. Crim. P. 32(b). See *Symposium*, 34 Rocky Mt. L. Rev. (1961).

77 Fed. R. Crim. P. 32(a).

78 See, e.g., Williams v. New York, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949).

79 Colo. Rev. Stat §39-9-6(8) (1953).

80 See Waelder, *Psychiatry and the Problem of Criminal Responsibility*, 101 U. Pa. L. Rev. 378 (1952).

81 Arnold, The Symbols of Government 10-13 (1935). Arnold relates the story of the condemned prisoner who attempted suicide and was kept alive until the execution by blood transfusions. The blood was donated by the prison guards!

82 The Mentally Disabled and the Law, op. *cit. supra* note 64, at 357-58 for numerous citations.

83 Nobles v. Georgia, 168 U.S. 398, 18 S.Ct. 87, 42 L.Ed. 515 (1897); Solesbee v. Balkcom, 339 U.S. 9, 70 S.Ct. 457, 94 L.Ed. 604 (1950); Berger v. People, 123 Colo. 403, 231 P.2d 799 (1951).

84 Weihofen, Mental Disorder As A Criminal Defense 464-65 (1954).

society is not served by executing an insane man. Further, the condemned man must be able to *appreciate* the reasons why the state is taking his life.

Whether society is ever served by capital punishment is questionable. Debate on that question is beyond the scope of this article. The illogic of finding a condemned man insane, subjecting him to extensive and expensive psychiatric care so that he goes into the gas chamber with the ability to *appreciate* seems clear.[85]

The Colorado statute provides that:

> . . . The defendant is not to be considered as insane if he has sufficient intelligence to understand the nature of the proceeding against him, the charge of which he was convicted, the purpose of his punishment, and the impending fate which awaits him, and has sufficient mind to know of any facts which would make his punishment unlawful and to communicate such facts to his attorney or to the court.[86]

Justice Traynor of the California Supreme Court has said, "Is it not an inverted humanitarianism that deplores as barbarous the capital punishment of those who have become insane after trial and conviction, but accepts the capital punishment of sane men."[87] The overriding consideration of disutility in executing anyone tends to make a horrible joke out of the consideration shown the mentally ill.[88]

d. *Appeal*—There is no provision in the Colorado statute, and no case appears to have arisen, concerning delay of an appeal pending restoration of sanity. Some few jurisdictions feel that meritorious grounds for appeal may be lost if the defendant cannot intelligently assist counsel.[89]

The defendant has a minimal role to play in perfecting, briefing and arguing an appeal. Unless questions of fact are involved he need not even be consulted since the grounds are probably the sole result of the attorney's appraisal of the case.[90] Under our present system, delay in making an appeal may be positively harmful to the defendant. A clearly unjustified conviction should be corrected at the earliest moment.[91]

2. PROCEDURE

a. *Raising the question*—The Colorado statute is somewhat vague on just how, and by whom, an allegation of present insanity may be made. The statute states that:

> [T]he judge of the court in which the criminal charge against such defendant is or has been pending, if he believes the defendant is insane or has a reasonable doubt thereto, *of his own motion* may impanel a jury to determine by its verdict

85 See Duffy and Jennings, The San Quentin Story 80-82 (1950). Weihofen, *A Question of Justice: Trial or Execution of an Insane Defendant*, 37 A.B.A.J. 651, 652 (1951).

86 Colo. Rev. Stat. §39-8-6(8) (1953).

87 Phyle v. Duffy, 34 Cal. 144, 159, 208 P.2d 668, 676-77 (1949). (Concurring opinion.)

88 The suggestion that new reasons or evidence might be forthcoming, as a basis for the rule, is unconvincing. Trial and appeals were had and counsel can convey factors which might influence a pardon. See Guttmacher and Weihofen, Psychiatry and the Law 434 (1952).

89 Williams v. State, 135 Tex. Crim. App. 585, 124 S.W.2d 990 (1938); People v. Skwirsky, 213 N.Y. 151, 107 N.E. 47 (1914).

90 The grounds for appeal may be only too well known to the lawyer if he is responsible for an inartistic trial.

91 See Note, *Appellate Proceedings Stayed During Insanity of Accused*, 56 Colum. L. Rev. 133 (1956).

> whether such defendant has thus become and then is insane. [S]uch allegation is made in a verified petition filed in the court where the criminal charge is or has been pending, supported by the affidavit of a physician who is a specialist in mental diseases, stating as his opinion that the defendant has thus become and is insane.[92] (Emphasis added.)

It is clear that the judge may raise the issue on his own motion and the defendant, or counsel, may do so by verified petition supported by a psychiatrist's affidavit. In the unlikely situation of the district attorney's wishing to urge the defendant's present insanity, the court would, no doubt, be persuaded to make this its own motion.

The common law procedure requires no special plea or formality and can be made orally, by affidavit or in any form sufficient to raise a doubt.[93] The question could be raised not only by the court, defendant or his counsel, but by any person.[94] The question in Colorado would be whether any interested party could present a properly supported verified affidavit. The question seems never to have come up.

The majority of the states have retained the substance of the common law rule.[95] Ohio is the only other state which requires the physician's affidavit.[96]

b. *Hearing*—When the issue of present insanity arises, many states distinguish the type of hearing available according to the time the insanity allegedly emerged. Pre-conviction and post-conviction insanity is handled in much the same fashion in Colorado.

If a verified petition and psychiatrist's affidavit are properly filed in the court where the criminal charge is, or has been pending:

> [T]he judge of the court may make such investigation as to the condition of the defendant's mind as *in his discretion* he deems advisable. If after such investigation the judge believes that the defendant has thus become and then is insane, or has a reasonable doubt thereto, with all convenient speed, he must inpanel a jury to determine by its verdict whether the defendant has thus become and then is insane.[97] (Emphasis added).

Thus, in Colorado, the ultimate decision whether a defendant has a hearing on the issue of present sanity rests with the trial judge. The defendant is given a statutory procedure for *raising the question* but this is obviously not a hearing on the merits. There is no provision for the presentation of evidence to the judge, without a jury, for the purpose of showing present insanity. The court is empowered to make an investigation, and this could include hearing defendant's evidence, but only to decide whether cause exists to impanel a jury.[97a]

No Colorado case has been found which deals with a possible abuse of discretion by the trial court in failing to impanel a jury

92 Colo. Rev. Stat. §39-8-6(3),(4) (1953).
93 Weihofen, Mental Disorder as a Defense 440-41 (1954).
94 *Id.* at 441.
95 Then Mentally Disabled and the Law, *op. cit. supra* note 64, at 360.
96 Ohio Rev. Code. Ann. §2945.35 (Baldwin 1958).
97 Colo. Rev. Stat. §39-8-6(4) (1953).
97a Evidence is not inadmissible at such a hearing solely because it antedates the entry of judgment and sentence. See Garrison v. People, 15 Colo. Bar Ass'n Adv. sh. 160 (1963).

on the issue of incompetency before trial, or after conviction and prior to sentencing. All the major cases in this area deal with insanity prior to execution of the death sentence. Other jurisdictions have been reluctant to find an abuse of discretion and reversals are rare.[98]

It may come as a surprise that there is apparently no constitutional right to a hearing; that a defendant may be precluded from being heard, presenting witnesses and cross-examining the court-appointed psychiatrist.[99] Three reasons are offered for this position: (1) This is merely a continuation of the common law rule, (2) The plea of present insanity does not affect guilt or innocence, and (3) An appellate court is available to order a hearing in the event that defendant made a proper showing in the trial court.[100]

If the reasons for not trying or sentencing a mentally ill defendant are valid, then a more satisfactory method for deciding that issue must be devised.

Defendants are probably reluctant to plead insanity in order to delay trial or sentencing. If they are mentally disturbed at, or near, the time of trial the effort will be made to escape criminal responsibility. A very different matter is at issue when the defendant seeks to avoid the death penalty.

The earlier disputes concerning the right to a jury on the issue of insanity at the time of execution of the death penalty have been positively resolved by statute.[101] As in the other cases of present insanity, the trial judge must entertain a "reasonable doubt" before he is required to impanel a jury. The statute which formerly governed this area stated: "In all . . . [cases of present insanity] it shall be the duty of the court to impanel a jury to try the question whether the accused be at the time of impaneling insane or lunatic."[102]

In *Bulgar v. People*,[103] although the point was not directly before the court, it was indicated that since the statute did not state the manner in which insanity should be ascertained at the outset, the common law should apply. This, of course, meant that the decision to impanel a jury was in the absolute discretion of the trial court. The earlier statute could, and probably should, have been interpreted as changing the common law.[104] All the cases following *Bulgar* are in accord with the dictum.[105]

Colorado follows the common law in holding that only the court where the trial was held has jurisdiction to make inquiry into the present mental condition of a condemned defendant.[106] The defendant remains in the technical custody of such court which has

98 See Weihofen, *op. cit. supra* note 93, at 444-45, 447.

99 See State v. Neu, 180 La. 545, 550-51, 157 So. 105, 106 (1934). *But cf.* Higgins v. United States, 205 F.2d 650 (9th Cir. 1953), *cert. denied* 346 U.S. 870, 74 S.Ct. 134, 98 L. Ed. 379 (1954).

100 While this question has received little attention, see Weihofen, *op. cit supra* note 93, at 446. State v. Neu, *supra* note 99.

101 Colo. Rev. Stat. §39-8-6(4) (1953).

102 Colo. Stat. Ann. ch. 48, §7 (1935).

103 61 Colo. 187, 193, 156 Pac. 800, 804 (1916).

104 Berger v. People, 123 Colo. 403, 417, 231 P.2d 799, 806 (1951). (Holland, J., dissenting.)

105 Shank v. People, 79 Colo. 576, 247 Pac. 559 (1926); People *ex rel.* Best v. Eldred, 103 Colo. 334, 86 P.2d 248 (1938); Berger v. People, 123 Colo. 403, 231 P.2d 799 (1951); Leick v. People, 140 Colo. 564, 345 P.2d 1054 (1959).

106 People *ex rel.* Best v. Eldred, *supra* note 105.

responsibility to see that the sentence is carried out. Thus, the condemned man is denied access to other judicial remedies for a determination of present sanity.

In addition to answering the jury trial question, *Bulgar* also stated that, "We are very certain, however, that it was intended by the common law and the statute that a collateral hearing of this character should not be subject to review by an appellate tribunal."[107] The court thus precluded review by writ of error or certiorari.

If the defendant convinces the trial judge that doubt exists concerning his present sanity then, by statute, the trial is deemed a civil proceeding. The jury is selected as in civil cases. The burden is on the defendant to prove, by a preponderance of the evidence, insanity at that time *and* as having occurred since the commission of the offense, or since the verdict of guilty, or since the judgment, as the case may be.[108]

This entire statutory scheme has been held constitutional.[109] The court relied on decisions by the Supreme Court of the United States which characterized these proceedings as analagous to reprieves. This power is usually vested in the executive, rarely subject to judicial review, and therefore none of the usual safeguards surrounding the trial of guilt are required.[110]

c. *Disposition if Found Incompetent*—Colorado, along with at least thirty-nine other jurisdictions, requires mandatory hospitalization if the defendant is found presently insane. The defendant is to be confined in the State Hospital at Pueblo until he is no longer insane.[111]

d. *Recovery*—In many states the certificate of the superintendent of the hospital where the defendant is confined is sufficient to warfant resumption of the criminal process.[112] The Colorado statute, however , treats the certificate of recovery as the first step in the process. The certificate is sent to the trial judge who must then notify the district attorney and then with all due speed impanel a jury. The court has no discretion as to a jury trial for this decision.[113] The burden is upon the defendant to prove by a preponderance of the evidence that he is insane.[114]

If the defendant is found sane then he is to be quickly tried, sentenced or executed as the case may be. If he is found insane, in spite of the hospital's opinion, he is recommitted on the same conditions as before.[115]

---

107 Bulgar v. People, 61 Colo. 187, 198, 156 Pac. 800, 804 (1916).

108 Colo. Rev. Stat. §39-8-6(7) (1953).

109 Leick v. People, 140 Colo. 564, 345 P.2d 1054 (1959).

110 Nobles v. Georgia, 168 U.S. 398, 18 S.Ct. 87, 42 L.Ed. 515 (1897); Solesbee v. Balkcom, 339 U.S. 9, 70 S.Ct. 457, 94 L.Ed. 604 (1950); Williams v New York, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949).

111 Colo. Rev. Stat. §39-8-6(5) (1953). The defendant, in addition to present insanity, must prove that he has become insane *since* the time at issue.
The Mentally Disabled and the Law 361 (Lindman & McIntyre ed. 1961).

112 Weihofen, *op. cit. supra* note 93, at 458.

113 Colo. Rev. Stat. §39-8-6(5) (1953).

114 Colo. Rev. Stat. §39-8-6(7) (1953).

115 Colo. Rev. Stat. §39-8-6(5) (1953). The court has the power to, and must at the district attorney's request, order the defendant committed for observation and examination under the §39-8-2 (Supp. 1961) procedure in case of any of these hearings.

III. PROCEDURAL IMPLEMENTATION OF THE IRRESPONSIBILITY DECISION

A. Raising the Defense

In Colorado, and at least nine other states, the defense of insanity must be specially pleaded.[116] The defense must be pleaded orally at the arraignment in the form, "Not guilty by reason of insanity at the time of the alleged commission of the crime."[117] The court may, for good cause shown, permit the plea to be entered any time prior to the trial.

Failure to raise the defense at the proper time and in the proper form will result in the unavailability of insanity as a defense. Before 1927, the defendant could raise the question by a general plea of not guilty. The present procedure is said to have preserved the defendant's constitutional right to the defense and his right to a jury trial.[118] The statute is viewed as having affected a procedural change only.

There is no question about the propriety of requiring a special plea. In view of the technical nature of the proof involved, the prosecutor has a legitimate right to have adequate notice. So long as our present framework exists, the reason for the rule is clear and if the rule is not rigidly applied, it serves a useful purpose. Colorado's special plea requirement seems preferable to allowing the plea initially at the trial or allowing it under a general plea of not guilty.[119] This procedure would be harmonious with the suggestion that there should be a liberal pre-trial exchange of data and psychiatric evaluations.

B. Trial

The Colorado Legislature and Supreme Court have experienced grave difficulties in deciding whether the insanity issue must, or should, be tried separately. There have been at least four major changes on this point since 1927. The net result is that the present law is essentially the same as it was in 1927. If the defendant pleads the defense of insanity, and joins with it other pleas not involving insanity, the trial judge has the discretion to try the insanity issue alone or hold one trial upon all issues raised.[120]

In *Ingles*[121] the court commented on the constitutionality of the trial court's discretion in granting separate trials. Explicitly noting that it was not deciding the question, the court said any possible problem would be obviated by hearing all defenses in a single trial.[122] In *Wymer*[123] the defendant complained that it was error to deny him a separate trial on the insanity question since he was compelled to submit to observation and examination upon pleading insanity. The court cited *Ingles* as dispositive of the question.[124]

116 Weihofen, Mental Disorder as a Criminal Defense 357 (1954). Fourteen jurisdictions provide for prior notice of intent to rely on an *alibi* defense.
117 Colo. Rev. Stat. §39-8-1 (Supp. 1960). Colo. R. Crim. P. 11(b). See 34 Rocky Mt. L. Rev. 20 (1961).
118 Ingles v. People, 92 Colo. 518, 522-23, 22 P.2d 1109, 1111 (1933).
119 A plea of insanity may not be entered by the court on its own motion. See Mundy v. People, 105 Colo. 547, 100 P.2d 584 (1940); Boyd v. People, 108 Colo. 289, 116 P.2d 193 (1941). But see Overholser v. Lynch, 288 F.2d 388 (D.C. Cir. 1961).
120 Colo. Rev. Stat. §39-8-3(1) (Supp. 1960).
121 Ingles v. People, 92 Colo. 518, 22 P.2d 1109 (1933).
122 *Id.* at 530, 22 P.2d at 1114.
123 Wymer v. People, 114 Colo. 43, 160 P.2d 987 (1945).
124 *Id.* at 49, 160 P.2d at 990.

It is true that *Ingles* upheld the commitment and examination aspect of the statute but, as noted previously, it did not decide the single trial issue. Nevertheless, the court upheld the procedure, feebly adding that to hold otherwise would mean every conviction of crime involving an insanity defense prior to 1927 was unconstitutional.[125]

The legislative experiment in 1951 required that the defendant be first tried on the substantive offense if he entered pleas not limited to insanity.[126] Defendant was conclusively presumed to be sane at the first trial and he might, in the discretion of the court, be tried by the same jury.[127]

Having "decided" that the trial court was properly vested with discretion to have separate trials or one trial on all issues, the question remained whether the judge could properly order a single trial first on the issues raised by defenses other than insanity. The *Martin* case came as close as any to providing an answer.[128] The trial judge set the trial on the substantive crime first but without ordering commitment and observation of the defendant. This was held to be error since "the commitment must follow immediately after the entry of the plea."[129] The court went on to volunteer that,

> "While we have considerable doubt as to whether an accused person can be compelled by statute to first stand trial upon the issues framed by a plea of not guilty, and compel withholding of determination of his mental responsibility until after a verdict has been rendered on the not guilty plea, we are not called upon to determine." [*sic*].[130]

In 1955, the legislature reacted to the court's doubts by giving the defendant the right to demand a separate trial on the insanity issue before being tried on any other defense.[131] At the same time the troublesome portions of the statute dealing with the conclusive presumption of sanity and trial of both issues before the same jury were omitted. The *Leick*[132] case made it clear that the plea of insanity is an admission of the offense charged but only for the purposes of the plea.

The supreme court has made it abundantly clear that separate trials are but sections of a single trial. Thus the trial court is not required to enter a judgment of sanity when the first trial is concluded so that the defendant may appeal.[133]

Conducting a separate trial first on the sanity issue seems sensible. The testimony on sanity is often technical and difficult to follow. A much wider area of conduct is disclosed at such a trial and this is bound to confuse and prejudice the jury if it is also to decide guilt.[134] In the framework of our existing system, the separate trial with wide evidentiary latitude is of real merit.

---

125 *Ibid.* See Martinez v. People, 124 Colo. 170, 235 P.2d 810 (1951).
126 Colo. Rev. Stat. §39-8-3 (Supp. 1960).
127 *Ibid.*
128 Martin v. District Court, 129 Colo. 27, 272 P.2d 648 (1954).
129 *Id.* at 29, 272 P.2d at 650.
130 *Id.* at 30, 272 P.2d at 650.
131 Colo. Rev. Stat. §39-8-3 (Supp. 1960).
132 Leick v. People, 136 Colo. 535, 322 P.2d 674 (1958).
133 *Ibid.*
134 See Trujillo v. People, 372 P.2d 86 (Colo. 1962).

C. Burden of Proof

Who has the burden of convincing the triers on sanity or insanity? Must the state first show that the defendant is sane or must the defendant offer proof of insanity?

All the states agree that every man is presumed sane until the contrary is demonstrated.[135] Thus the initial burden of going forward with some minimum amount of evidence of mental disorder rests with the defendant.[136] The first troublesome point in this process is deciding how much, and what kind of evidence will discharge this duty.

Nearly all the states agree that evidence sufficient to raise a *doubt* concerning defendant's responsibility must be produced.[137] Colorado has not definitely resolved this problem. Some cases speak in terms of "evidence tending to show insanity,"[138] while others use the less exacting "some evidence" phraseology.[139] The District of Columbia has long adhered to the "some evidence" rule and explains that defendant's obligation is met if he produces a "scintilla" of evidence.[140] Without being certain of the exact standard Colorado applies, it is safe to assume that the burden on defendants is minimal. Defense counsel's strategy often includes coming forward with a bare suggestion of mental disorder. The major defense evidence will be presented, in rebuttal, after the People present their case-in-chief.

After the judge is satisfied that there is a jury question, the problem remains as to who bears the "risk of non-persuasion," or less accurately, the "burden of proof." There are three major approaches to this problem.

The federal jurisdiction and about half the states, including Colorado,[141] require the state to establish *responsibility* beyond a reasonable doubt.[142] The remaining jurisdictions impose a duty on the defendant to establish *irresponsibility*, but only by the civil standard of a preponderance of the evidence.[143] Oregon formerly required the defendant to prove his irresponsibility beyond a reasonable doubt. This was held not to be a violation of the "due process clause" in *Leland v. Oregon*.[144] Oregon, however, has amended its statute to simply require of the defendant proof by a preponderance of the evidence.[145]

The proper form of verdict to be submitted to the jury is a problem which continues to plague Colorado courts. The 1927 statute required that when the defendant pleaded insanity, "the jury *shall be given* a form with the words 'not guilty by reason of

135 Jordan v. People, 19 Colo. 417, 36 Pac. 218 (1894). The presumption of sanity applies in civil and criminal actions. North American Acc. Ins. Co. v. Cavaleri, 98 Colo. 565, 58 P.2d 756 (1936); Hanks v. McNeil Coal Corp., 114 Colo. 578, 168 P.2d 256 (1946).

136 Weihofen states that there is virtual unanimity among the states in imposing the burden of going forward on the defendant. Weihofen, Mental Disorder as a Criminal Defense 227 (1954).

137 *Id.* at 227.

138 Graham v. People, 95 Colo. 544, 546, 38 P.2d 87 (1934); Arridy v. People, 103 Colo. 29, 33, 82 P.2d 757, 759 (1938).

139 Ingles v. People, 90 Colo. 51, 56, 6 P.2d 455, 457 (1931).

140 See *In re* Rosenfield, 157 F. Supp. 18 (D.C.D.C. 1957); Goforth v. United States, 269 F.2d 778 (D.C.Cir. 1959).

141 Nesbit v. People, 19 Colo. 441, 461, 36 Pac. 221, 228 (1894) (By implication); Pribble v. People, 49 Colo. 210, 215, 112 Pac. 220, 222 (1910).

142 The Mentally Disabled and the Law 350 (Lindman & McIntyre ed. 1961).

143 *Ibid.*

144 343 U.S. 790, 72 S.Ct. 1002, 96 L.Ed. 1302 (1952).

145 Ore. Rev. Stat. §136.390 (1961).

insanity.' "[146] (Emphasis added.) In *Mundy*,[147] questions of guilt and sanity were tried together before the same jury. The trial court concluded that there was no evidence of insanity and failed to give the jury the insanity form of verdict. The court held that while the presumption of sanity remained and the burden of proof was unchanged, "nevertheless, under the statute the *making* of the insanity plea and not the *state of the evidence*, call for the special form of verdict."[148] The court went on to explain that even if the defendant does not produce a single witness or testify himself, the plea must be submitted to the jury.[149] This would indicate that the entry of the plea was of sufficient weight to overcome the initial presumption of sanity. Yet the *Ingles* case unequivocally stated that "a plea that the defendant was insane is no more evidence tending to show insanity than is an information or indictment evidence tending to show guilt."[150]

In *Archina*[151] the court attempted, with little success, to explain *Mundy* as limited by the mandatory language in the statute and the fact that it involved a single trial of all issues. The *Archina* court was under the 1951 amendment which simply required that "the jury shall return a verdict either that the defendant was sane . . . or that he was insane. . . ."[152] Even if the statutory change was relevant, and it seems not to be, the problem of relating the statute to the presumption of sanity and defendant's initial burden of going forward remains. This is particularly true since *Ingles* held the plea of insanity entitled to no evidentiary weight. In 1955 the legislature returned to the mandatory language of the 1927 statute. "In a trial involving the plea of not guilty by reason of insanity, the jury *shall be given* a form of verdict . . . either that the defendant was sane at the time the alleged offense was committted or that he was insane at that time."[153] (Emphasis added.) Thus the illogic of *Mundy* remains and *Archina's* explanation is attenuated.

How can the trial judge be forced to submit an insanity verdict form if he decides that there is no evidence to overcome the presumption of sanity? The statute, to make any sense, must be read to mean that if the defendant meets the burden of going forward then, and only then, must the statutory verdict form be submitted to the jury.

D. Medical Examination

Upon making the plea of not guilty by reason of insanity, the judge must commit the defendant to a hospital for observation and examination by psychiatrists.[154] The period of commitment must not exceed thirty days.[155] The judge also has power to appoint impartial experts to examine the defendant during this period.[156]

146 Colo. Sess. Laws 1927, ch. 90, p. 297.
147 Mundy v. People, 105 Colo. 547, 100 P.2d 584 (1940).
148 *Id.* at 551, 100 P.2d at 586.
149 *Ibid.*
150 Ingles v. People, 90 Colo. 51, 56, 6 P.2d 455, 457 (1931).
151 Archina v. People, 135 Colo. 8, 41, 307 P.2d 1083, 1100 (1957).
152 Colo. Rev. Stat. §39-8-4 (1953).
153 Colo. Rev. Stat. §39-8-4(1) (Supp. 1960).
154 Colo. Rev. Stat. §39-8-2 (Supp. 1961). The statute specifies the Colorado Psychopathic Hospital or the State Hospital at Pueblo. A judge of the Denver District Court recently committed a defendant to first one, then the other hospital. He apparently was not satisfied by the opinion rendered after the first commitment.
155 *Ibid.*
156 *Ibid.*

The medical examination under this statute is subject to some specific regulations. The doctor may use confessions, admissions or any other available evidence for questioning the defendant and forming an opinion of his sanity.[157] He may administer certain drugs and use the polygraph to aid in forming an opinion and he may testify to their results at the sanity trial.[158]

The automatic commitment and observation procedure is required in at least twenty-three states and the District of Columbia.[159] It has the great merit of affording an indigent defendant the *possibility* of a speedy, thorough and impartial examination. There is a real need for current statistical data on the number of defendants found sane and insane by the staffs of Colorado hospitals. One suspects an unconscious, institutional bias toward sanity findings.[160]

Early experience under the statute, as reported by Weihofen, indicated that juries are very much persuaded by the hospital finding.[161] If this continues to be true then we must be clear about where the effective decision-making power lies, appraise the consequences and decide if this is to be encouraged. If the jury is a "rubber-stamp" for the hospital report, the time and expense of jury trials must be weighed against any sentimental value they may have. The results of the study reported here suggest that many defendants drop their insanity defense after an adverse finding by the hospital staff.

The commitment procedure has withstood all constitutional attacks. The statute was said to deprive a person of due process, to compel one to testify against himself and to unconstitutionally deprive a person of his liberty. The court has reasoned that a person accused of a crime, whose sanity is in question, could be confined at common law under conditions not as pleasant as those currently provided. There is no compulsion to testify against oneself since, as noted, any evidence first obtained at the examination is inadmissible on the issue of guilt. Since the legislature may constitutionally alter the procedures, the defendant must take the burdens with the benefits.[162]

The defendant is, of course, free to engage such experts as he desires and can afford.[162a] The district attorney may also engage psychiatrists to examine the defendant. The statutory procedure

---

157 Cf. Ingles v. People, 90 Colo. 51, 60, 6 P.2d 455, 459 (1931).

158 Colo. Rev. Stat. §39-8-2 (Supp. 1961). No substantive evidence obtained for the first time may be offered on the issue of guilt except at a murder trial to rebut evidence of defendant's ability to form the requisite intent.

159 The Mentally Disabled and the Law, op. *cit. supra* note 142, at 351.

160 Weihofen reports that 26% of the Colorado defendants committed during the first twenty-two years of the procedure were found insane by hospital authorities. Weihofen, Mental Disorder as a Criminal Defense 338 (1954). See Weihofen, *An Alternative to the Battle of Experts: Hospital Examination of Criminal Defendants Before Trial*, 2 Law & Contemp. Prob. 419 (1935) for an outdated but thorough study of Colorado's experience under the statute.

161 *Ibid.*

162 See Ingles v. People, 90 Colo. 51, 6 P.2d 455 (1931); Ingles v. People, 92 Colo. 518, 22 P.2d 1109 (1933); Wymer v. People, 114 Colo. 43, 160 P.2d 987 (1945); Martin v. District Court, 129 Colo. 27, 272 P.2d 648 (1954). Weihofen, *Insanity as a Criminal Defense in Colorado*, 9 Rocky Mt. L. Rev. 213 (1942).

162a Goldstein and Fine, *The Indigent Accused, The Psychiatrist, and the Insanity Defense*, 110 U. Pa. L. Rev. 1061 (1962).

Bush v. Texas, 353 S.W.2d 855 (Tex. Crim. App. 1962), *cert. granted*, 31 U.S.L. Week 3128 (U.S. Oct. 16, 1962) (No. 75) raises the question whether an indigent accused has a constitutional right, in a state court, to the appointment of a psychiatrist when an insanity defense is raised.

has been held not to be exclusive as to the state or the defendant.[163] Under these circumstances, in order to avoid current abuses, the district attorney should be compelled to require his psychiatrists to reveal the source of their employment, the purpose of the examination and the consequences likely to result, *e.g.*, giving testimony based on the interview.

The adversary process is not well adapted to fostering rational decisions when highly technical issues and emotionally charged facts are involved. The spectacle of partisan experts, emotionally involved relatives and friends, and confused lawyers trying to determine a defendant's mental condition is often appalling. Conceding the difficulty, perhaps impossibility, of radical change, the law should attempt to approximate calm, dispassionate decisions within the present framework.

One suggestion, easily accomplished, is to require the district attorney and the defendant to share freely, in advance of trial, *all* the evidence available on the mental condition of the defendant. Ultimately, a panel of impartial psychiatrists and psychologists should be available. The district attorney and the defendant should, under court supervision, be required to utilize a limited number of experts from such panel to the exclusion of any other experts. The expenses involved can be shared if the defendant is financially able.

Until such time as we have a device which diminishes the "shopping for experts," there should be the freest possible pretrial exchange of data. The benefits of avoiding surprise, shabby and intimidating tactics, and creating an atmosphere of honest inquiry should be immediately obvious.

E. Testimony

In all states but three, the opinion of a layman on the sanity of the defendant is admissible in evidence.[164] There is some question as to who is an expert and who is a layman in this context. For example, is a qualified clinical psychologist an expert for this purpose? Must a medical doctor be a specialist in nervous and mental disorders?

There is no Colorado case directly on point concerning the psychologists. A judge of the Denver District Court recently refused to allow two clinical psychologists to testify as *experts*. They did testify as *laymen* because the court felt that giving an opinion, as an expert, on insanity constituted the practice of medicine and required a medical license.[165] The weight of authority elsewhere is clearly to the contrary.[166] When a clinical psychologist is properly qualified he should be able to testify as an expert on the question of sanity. He administers a battery of objective tests which are standardized, accepted and used by many psychiatrists. His entire training is devoted to evaluating human personality.

163 Early v. People, 142 Colo. 462, 352 P.2d 112 (1960). This case indicates real possibilities for abuse by the district attorney. Two doctors were hired and examined the defendant prior to arraignment. The entire procedure had an aura of deception and calculated abuse of defendant's civil rights. The dissent properly condemned this procedure.

164 New York, Maine and Massachusetts. The Mentally Disabled and the Law, *op. cit. supra* note 142, at 352.

165 This occured in the unreported case of People v. French, Denver District Court, Neil Horan, J., (1962). See Colo. Sess. Laws 1961, ch. 192, §108A-1-1 *et. seq.* for Psychologists Licensing and Regulation Act.

166 78 A.L.R.2d 919 (1961).

Two Colorado cases reveal that psychologists gave testimony at the trial. The court did not indicate any disapproval of this procedure.[167] If the trial judge carefully weighs the psychologist's qualifications and experience, there is no valid reason for not qualifying him as an expert.

The Colorado statute requires that the court-appointed doctor and those who perform the examination at the hospital be specialists in mental diseases.[168] A privately-retained doctor's ethics may permit him to express an expert opinion in a field in which he does not practice and has no special training. Only physicians with special training in mental disorders or considerable clinical experience should be qualified as experts on a sanity question.

Colorado, along with the great majority of states, permits a non-expert to give his opinion on the question of sanity. Such a witness must show some adequate means of becoming acquainted with the person involved, he must detail the facts and circumstances concerning his acquaintanceship and the acts, conduct and conversation upon which his conclusion concerning sanity is based.[169] A non-expert may never base his opinion on a purely hypothetical question. [170] His opinion is, in short, based on personal observation of such duration and kind that the trial court is satisfied with his basis of observation.

The trial court has great discretion in allowing non-expert opinion. There is, for example, no abuse of discretion, *in refusing* to permit a lay opinion where such a witness did not see or know defendant until immediately *after* the crime and the acquaintance was of short duration.[171] Proximity in time to the crime is an important condition precedent for a lay witness to establish.[172]

There are several instances where lay opinion has been more persuasive than expert opinion.[173] A shocking crime and a defendant who does not dramatically display his illness will combine to create jury receptivity for non-expert opinion. The expert's courtroom demeanor is also a significant factor.[174]

The practice of permitting a layman to express an opinion concerning a medical condition which vexes psychiatrists is highly questionable. The popular conception of mental illness includes a complete breakdown of intellect, a loss of reason, and a serious loss of self-control.[175] The mass media project an image of a wild-eyed, disheveled individual who is incoherent and completely out of touch with reality. This is likely to condition the public's image. Psychiatrists know that the manifestations of mental disorder are many

167 Early v. People, 142 Colo. 462, 352 P.2d 112 (1960); Hammil v. People, 145 Colo. 577, 361 P.2d 117 (1961).

168 Colo. Rev. Stat. §39-8-2 (Supp. 1961).

169 Turley v. People, 73 Colo. 518, 216 Pac. 536 (1923).

170 *Ibid.*

171 Smith v. People, 120 Colo. 39, 206 P.2d 826 (1949). Lay witnesses who met defendant more than three months after the crime were held properly excluded. See McGonigal v. People, 74 Colo. 270, 220 Pac. 1003 (1923).

172 Leick v. People, 136 Colo. 535, 322 P.2d 674 (1958).

173 Wymer v. People, 114 Colo. 43, 160 P.2d 987 (1945). In Graham v. People, 95 Colo. 544, 38 P.2d 87 (1934), the state produced no witnesses to rebut the experts testifying that defendant was insane. The case was reversed and remanded for a new trial.

174 "Prosecutors tend to select psychiatrists who are conservative, more or less rigid and who tend to identify themselves with authoritarian viewpoints and with ruling class ideology, and who never question their premises." Roche, The Criminal Mind 112-13 (Evergreen ed. 1959).

175 Star, Shirley, *The Public's Ideas About Mental Illness.* Paper presented to the National Association for Mental Health (1955). Reprinted in Donnelly, Goldstein and Schwartz, Criminal Law 818 (1962).

and varied. The behavior patterns include the hyper-active and bizzare; and the passive and conforming.[176]

The real danger relates to the seriously ill individual whose behavior patterns are contrary to the popular conception of "crazy." Most laymen are no more qualified to give an opinion on his condition than they are to lecture on quantum mechanics. If a proper foundation is laid, a layman might be qualified to recall his first-hand impressions about the observed behavior of the defendant. He should never go further. Ideally, providing data to the expert outside the courtroom is probably the outer limits of a layman's effectiveness.

The law places many obstacles in the path of the expert witness:

> A physician is permitted to express his opinion based upon facts personally observed by him, in connection with the defendant's history given by the defendant . . . , also to express his opinion based upon facts that are in evidence. In the latter case the opinion is stated in answer to a hypothetical question. . . . He cannot express an opinion based, in whole or in part, upon information obtained from third persons who have not testified to the facts. A defendant is entitled to test the reliability of such statements made by a third person . . . by cross-examining . . . .[177]

An expert witness may testify that he *referred* to blood tests, psychological testing, nurses' charts and the opinions of other doctors. He is safe so long as he positively states that he formed his opinion independently and did not *rely* upon the sources.[178] The doctor must be careful not to mention that several of his colleagues agreed with his opinion. This has been held, in effect, to multiply the number of doctors asserting the opinion.[179]

The doctor's opinion is rarely the product of his exclusive efforts and observations. It is recognized hospital procedure to make a diagnosis based, in part, on the efforts of other specialists, such as psychologists, neurologists, laboratory technicians and even nurses. Frequently the entire staff observes and passes on the mental condition of a patient and then the superintendent makes his report to the court.[180] Thus, it would seem that while the doctor has learned the correct verbal formula to avoid the strictures of the "hearsay rule," he is often being less than honest.

The doctor should be required to state fully the various tests which were administered, and by whom, the results and the regularity of such procedure. He should disclose whether or not there were staff consultations and the opinion, if any, of the staff. If there was free pre-trial exchange of this information, as previously suggested, the defendant would be free to evaluate and investigate any phase of the procedure. This preserves the function

---

176 See generally, Guttmacher and Weihofen, Psychiatry and the Law ch. 3 (1952); Roche, The Criminal Mind (Evergreen ed. 1959); Strecker, Ebaugh, Ewalt, Practical Clinical Psychiatry (7th ed. 1955).

177 Ingles v. People, 90 Colo. 51, 60, 6 P.2d 455, 459 (1931). See Cook v. People, 60 Colo. 263, 153 Pac. 214 (1915) on hypothetical questions.

178 Silliman v. People, 114 Colo. 130, 162 P.2d 793 (1945); Skeels v. People, 145 Colo. 281, 358 P.2d 605 (1961).

179 Carter v. People, 119 Colo. 342, 204 P.2d 147 (1949); Bauman v. People, 130 Colo. 248, 274 P.2d 591 (1954).

180 For procedure in Colorado hospitals see Weihofen, *An Alternative to the Battle of Experts: Hospital Examination of Criminal Defendants Before Trial*, 2 Law & Contemp. Probs. 419, 422 (1935).

of the "hearsay rule" and allows the doctor to maintain his integrity as a witness.[181]

A standard treatise cannot be read into evidence, or referred to in cross-examination of an expert, unless the witness concedes that he is familiar with it and used it to form his opinion.[182] Counsel advise their experts to eschew any knowledge of, or reliance upon, such treatises.[183]

The heart of the testimonial problem is posed at the dramatic moment when counsel asks, "Now doctor will you tell us if, on the date in question, the defendant was capable of distinguishing right from wrong, or being able to so distinguish, was able to choose the right and refrain from doing the wrong." The jury can disregard the expert, and sometimes they do, but the doctor's answer to this question is in reality an answer to the ultimate question at issue. The defendant's *responsibility* is directly and inseparately related to the answer.[184]

The simple truth is that we ask the psychiatrist to make a moral judgment about the defendant. Dr. James Galvin has affirmed in open court that, "a psychiatrist is no more qualified to determine the capacity of an accused to recognize right and wrong than a plumber."[185] Dr. Philip Roche states that in making this moral decision, "the psychiatrist, the juryman, and the accused, have a common genealogy of morals."[186]

When a psychiatrist decides that the accused was, or was not, suffering from some type of mental illness, having a temporal connection with his unlawful act, he has gone as far as his training allows. This is a clinical function. If all the law requires of the doctor is a clear, clinical description of the defendant then we cannot ask the psychiatrist to morally evaluate the defendant. This, at the present time, is thought to be the jury's function.

Perhaps Dr. Szasz is correct when he observes that the law utilizes the psychiatrist as a functionary on whom the trier's guilt can be sympathetically displaced. Since "sane" and "insane" have little meaning except whether the defendant may be punished with a clear conscience, we probably use the doctor to dissipate the trier's guilt feelings.[187]

Unless lawmakers are absolutely certain that they wish to continue to require moral judgments from psychiatrists, modification is in order. The criminal law would be better served if the psychiatrist gave a clear, understandable, clinical evaluation of the defendant and his prognosis for the future including treatability and availability of treatment. The jury will then translate the clinical to the moral, sane or insane. Further translation by the

181 Counsel is given great latitude in his cross-examination of an expert to see what part a "hearsay" document played in his opinion. Adherence to the verbal formula of *independent opinion and no reliance* on other's work satisfies the court. See Archina v. People, 135 Colo. 8, 307 P.2d 1083 (1957); Wooley v. People, 367 P.2d 903 (Colo. 1961).

182 Baker v. People, 72 Colo. 68, 209 Pac. 791 (1922).

183 This may backfire when opposing counsel reads off an imposing number of books, some familiar to even the jury, and the expert denies any use or knowledge of them.

184 In upholding the propriety of the question, the Colorado Supreme Court distinguishes *responsibility* from *sane* or *insane*. Brown v. People, 116 Colo. 93, 178 P.2d 948 (1947).

185 Hammil v. People, 145 Colo. 577, 584, 361 P.2d 117, 120 (1961). This remark did not disqualify him from testifying.

186 Roche, The Criminal Mind 108 (Evergreen ed. 1959).

187 Szasz, *Some Observations on the Relationship of Law and Psychiatry*, 75 Arch. of Neurolog. and Psych. 1 (1956).

expert will not be required.[188] This suggestion is but part of the larger effort to place decision-making power in the most effective position. The value of a jury system lies in having a temporary body available which is capable of reflecting community sentiment. Let us be clear that we do not regard mental illness per se as an excuse for crime but that we weigh a defendant's mental illness along with the moral disapproval of his conduct. A jury is as qualified to perform that function as a psychiatrist.

F. Disposition After Verdict

In no state is a defendant simply set at liberty following an acquittal by reason of insanity. The states vary from automatic commitment, as in Colorado, to discretion of the trial judge and even a separate trial on the issue of present insanity.[189]

In Colorado, if the verdict is that the defendant was insane at the time of the offense, the judge must immediately commit the defendant to the State Hospital at Pueblo.[190] A full transcript of the evidence presented at trial must accompany the order of commitment.[191]

There is no constitutional objection to the automatic commitment based on a presumption of continuing insanity.[192] Indeed, it would be a highly questionable procedure which treated a finding of insanity exactly as any other acquittal. A defendant who successfully pleads insanity is, in effect, asking to be relieved of criminal responsibility in return for submitting to isolation from the public and undergoing treatment. The infliction of a past deprivation on the community is a sufficient basis for altering his present social relationships.

The courts are obviously not prepared to order a specific kind of treatment or decide its duration. These decisions are properly left to the hospital staff. The court, however, may play a pivotal role in deciding when an individual is ready to be returned to the community.

G. Discharge

The decision to return a person to society, after hospitalization, is at least as important as the commitment decision. Colorado has enacted a detailed release procedure. If the superintendent of the hospital believes the patient is no longer insane or eligible for probationary release, he must notify the committing judge who in turn notifies the district attorney.[193] The release decision is shared with the community in this fashion.

The judge must then order the patient committed to Colorado Psychopathic Hospital, for a term not to exceed thirty days, under the same terms as commitment following entry of the plea.[194] If the judge is satisfied with the reports following this observation period, he may then release the patient unconditionally or under a probationary release.[195] If the judge is unconvinced then he *must*

188 For a contrary view see, Cavanaugh, *Problems of a Psychiatrist in Operating Under the M'Naghten, Durham and Model Penal Code Rules*, 45 Marq. L. Rev. 478 (1962).
189 See Weihofen, Mental Disorder as a Criminal Defense 365 *et. seq.* (1954).
190 Colo. Rev. Stat. §39-8-4(2) (Supp. 1960).
191 *Ibid.*
192 See 145 A.L.R. 892 (1943).
193 Colo. Rev. Stat. §39-8-4(3) (Supp. 1960).
194 *Ibid.*
195 Colo. Rev. Stat. §39-8-4(4) (1953).

order a hearing with the defendant having the right to a jury. This is a civil hearing with the patient having to prove sanity by a preponderance of the evidence.[196] If the jury finds him sane the judge may still impose probationary conditions, but he must order his discharge. If the patient's insanity is found to continue, he is recommitted to Pueblo to await a similar release procedure in the future.[197]

The doctors by this procedure, must be certain they can defend their decision to release. Aside from the merit of not giving them the ultimate decision, this should induce careful and conservative decisions. The community has a legitimate interest in seeking to avoid future harm from one who has demonstrated his capacity for causing harm. One glaring defect in the Colorado procedure is the absence of any release standards. Must the patient now be able to distinguish right from wrong? Must he merely be improved? —or fully recovered?

The major considerations in this area should be the *dangerousness* of the person and the degree of certainty required of the prognosis *sufficiently recovered.*[198] No criteria for *dangerousness* have been clearly articulated. Dangerous behavior could, at least, include all crimes, the same crime, only "violent" crime or violence towards himself.[199]

"Reasonable foreseeability," not an absolute guarantee, is the most feasible standard of certainty for the prognosis. The medical profession is reluctant, and properly so, to guarantee any cure.

The desirability of requiring review of the doctor's release decision seems obvious. Psychiatrists are trained to work for early releases based on therapeutic indications. Many hospitals suffer from unmanageable patient populations and are forced to adopt an "in-and-out" philosophy.[200] With the patient clamoring for release and the judge and district attorney being institutionally skeptical, the psychiatrist will arrive at more precise, objective evaluations based on his expertise and community reaction. A case-by-case release procedure should provide the psychiatrists with a technique for integrating therapeutic indications and community tolerance.

IV. PARTIAL RESPONSIBILITY

A mental condition unable to meet the test for total criminal irresponsibility may result in a diminution, in grade, of the offense for which the defendant stands accused. If the offense charged requires a mental state, *e.g.*, specific intent, which the defendant is unable to achieve, he should not be held responsible for such offense. This is the doctrine of "partial responsibility," or less accurately, "partial insanity." In theory, it should be available in any crime requiring some specific intent. In practice, it is almost exclusively limited to reducing first-degree murder to second-degree murder. [201]

196 *Ibid.*
197 Colo. Rev. Stat. §39-8-4(5) (1953).
198 See Hough v. United States, 271 F.2d 458 (D.C.Cir. 1959).
199 See Goldstein and Katz, *Dangerousness and Mental Illness—Some Observations About the Decision to Release Persons Acquitted by Reason of Insanity*, 70 Yale L.J. 225 (1960).
200 Diamond, *From M'Naghten to Currens, and Beyond*, 50 Cal. L. Rev. 189, 202-03 (1962).
201 See Perkins, Criminal Law 767-71 (1957).

There is no logic in confining this concept to cases of homicide. A person entering another's dwelling may not be capable of forming the specific intent to commit a felony, yet be legally sane. For the most part, the law has been unable to accomodate itself to this situation.

There is nothing very startling about the doctrine of partial responsibility, although the bitter polemics and mechanical application of insanity rules have served to obscure its legal basis. Anglo-American criminal law requires a *concurrence* of *mens rea* (the internal fusion of thought and effort) with an *act* before conduct is designated as criminal.[202] This would suggest an "all or nothing" doctrine of responsibility. Indeed, most states continue to view responsibility in this fashion.

Colorado accepted the doctrine of partial responsibility in the *Brennan* case.[203] The court said that "in behalf of the defense, insanity, intoxication, or any other fact which tends to prove that the prisoner was *incapable of deliberation,* was competent evidence for the jury to weigh."[204] (Emphasis added.) This would suggest that the court did not prescribe the same dimensions for "ability to deliberate" and insanity. In *Shank,*[205] the defense of insanity was made to a charge of murder. The defendant requested that the jury be instructed to acquit if he was incapable, by reason of mental derangement, of forming an intent. This instruction was held to be properly refused. "One who knows right from wrong and has power to choose necessarily has power to form the intent to choose. One who does not or has not is, in law, insane."[206]

The *Shank* opinion does not refer to *Brennan* and seems to be at odds with it. The court equated the ability to form a specific intent with the test for insanity without appearing to realize the implications. Two subsequent cases offered the court an opportunity to clarify this problem.

The *Ingles*[207] case indicated that if a defendant did not avail himself of the statutory procedure for entering a plea of not guilty by reason of insanity, he was precluded from claiming irresponsibility on that ground. But such a defendant would be entitled to introduce evidence of mental derangement, short of insanity, to reduce the crime from murder in the first-degree to murder in the second-degree. In *Battalino*[208] the court modified the *Ingles* decision. It was made clear that evidence of insanity, when pleaded as a defense, may not be used to reduce the offense in grade unless the evidence is relevant to *willfulness* and *deliberation* in the killing. The court found that whether the evidence offered on the defense of insanity is relevant to the question of willfulness and deliberation is a question of law for the court to decide. An instruction on second-degree murder can therefore be properly refused if

---

202 Hall, General Principles of Criminal Law 185-86 (2d ed. 1960).

203 Brennan v. People, 37 Colo. 256, 86 Pac. 79 (1906). "Partial responsibility" should be distinguished from the Continental concept of "diminished responsibility." See Stewart v. United States, 275 F.2d 617, 623 (D.C.Cir. 1960) and Weihofen, *op. cit. supra* note 189, at 176-77.

204 *Id.* at 263, 86 Pac. at 82 quoting State v. Johnson, 40 Conn. 136 (1873).

205 Shank v. People, 79 Colo. 576, 247 Pac. 559 (1926).

206 *Id.* at 583, 247 Pac. at 562.

207 Ingles v. People, 92 Colo. 518, 22 P.2d 1109 (1933).

208 Battalino v. People, 118 Colo. 587, 199 P.2d 897 (1948).

the trial judge feels the insanity evidence does not bear on the essential elements of first-degree murder.[209]

The Colorado cases, then, would indicate that partial responsibility is recognized. The defendant must be certain that his evidence is directed to a negation of the elements of first-degree murder rather than proof of insanity. If the statutory procedure for pleading insanity as a defense is not followed, then regardless of the mental disorder present, there can be no acquittal, only a reduction of the offense.

The Colorado statute expressly provides that in a proper case evidence of mental condition may be offered as bearing upon the capacity of the accused to form a specific intent essential to constitute a *crime*.[210] While the statutory language appears broad enough to include crimes other than homicide, the cases make it rather clear that partial responsibility is confined to homicide.

The statute gives the trial courts discretion whether there shall first be a separate trial on the insanity issue or one trial of all the issues.[211] The partial responsibility problem will arise if there is a single trial, or at the trial of the substantive offense following a verdict of sane.

Partial responsibility has a place in the theoretical framework of the law, if only to comfort those who try the issue of guilt by having several grades of culpability available. In the final analysis, a finding that the defendant is guilty of second-degree murder because he could not form the specific intent is indicative of the triers' relative moral disapproval.[212] Indeed, jury findings are comprehensible only on the basis of a moral decision.[213] The law's problem is to revise its theoretical framework to account for the various mental disorders and at the same time to facilitate communication between law and psychiatry. Partial responsibility is only a partial answer.

V. Toward A Rational Development of Criminal Responsibility

A.

First, what exactly is meant by the word *responsibility?* Previously, it has been used interchangeably with *insanity*.[214] Within the contours of the present inquiry, it means little more than what we intend to do with an offender. *Responsibility* is not a quality which resides in an offender, unless, perhaps, we make some metaphysical reference. It resembles a scale of values by which decision-makers reckon a proper *punishment*.[215] To decide *responsibility*, the offender, his conduct and the degree and extent of the disturbance are correlated with the decision-maker's scale of values.

Stated differently, *responsibility* means that a "normal" adult has "caused," in a teleological sense, a proscribed "harm" and he

209 For elaboration on this theme see Berger v. People, 122 Colo. 367, 224 P.2d 228 (1950); Leick v. People, 131 Colo. 353, 281 P.2d 806 (1955) and Becksted v. People, 133 Colo. 72, 292 P.2d 189 (1956).
210 Colo. Rev. Stat. §39-8-1 (Supp. 1960). See Colo. R. Crim. P. 11(b).
211 Colo. Rev. Stat. §39-8-3 (Supp. 1960).
212 See Roche, The Criminal Mind 84 (Evergreen ed. 1959).
213 See Repouille v. United States, 165 F.2d 152 (2d Cir. 1947).
214 See p. 326 *supra*.
215 See Roche, The Criminal Mind 170 (Evergreen ed. 1959).

is thus subject to "punishment."[216] Common to any approach to *responsibility* is the notion that the infliction of deprivations must be mutual. The conceptual bridge to the state's infliction of a deprivation on an individual offender is *responsibility.*

Underlying any approach to reform in the criminal law is the extent to which prevailing notions of responsibility are to be retained. We move on a graduated scale between the outer dimensions of responsibility—punishment, and care, custody and treatment. The further we move from responsibility—punishment, the less need there is to be concerned about revising any *particular* part of criminal law since the underlying notion will have been revised.[217]

A preference for movement in the direction of care, custody and treatment for all persons whose behavior and clinical apearance indicate the need is hereby acknowledged. The feasibility of attaining such an ultimate goal is, of course, quite another matter. For now, identification and articulation of the problem are sufficient.

In dealing with reform in any area one is always confronted with a choice between immediate expediency and ultimate ideals. The choice may be avoided, however, if reform *goals* are identified in terms of immediate, intermediate and ultimate attainments. The improbability of attaining ultimate ideals, or goals, should not preclude stating them. If nothing else, they provide direction and abstract policy for making contemporary decisions. Immediate and intermediate goals are a compromise to expediency. One must consider among other things, subjective elements, economics and political pressures.

Here we shall deal with a series of questions and proposed solutions based on what seems attainable now, in the near future and in the remote future—or never. Review of all the arguments about the relative merits of the Durham Rule, the Model Penal Code or the Currens Rule is sacrificed in order to deal with more abstract, and perhaps more fundamental questions.[218]

What do we wish to accomplish with the mentally ill offender? Who, with what qualifications, in what institutional setting, using what procedure, should make what decisions?

Ultimately, it may be superfluous to single out for identification the mentally ill offender. If the state's response to a deprivation caused by a mentally ill offender is custody, care and treatment, then it becomes sensible to create a *functional* classification which includes all offenders with similar needs. This could include the immature (youth and senility), transients, recent immigrants, persons with minority sub-group values and those with exceptional originality.[219] The emphasis would be on adaptive re-education

---

216 Hall, General Principles of Criminal Law 296 (2d ed. 1961).

217 See Lewis, *The Humanitarian Theory of Punishment,* 6 Res Judicata 224 (1953).

218 For full citations and text of these decisions see notes 8, 9, 10, 11, and 12, *supra.*

The following should be particularly helpful to the reader who wishes to evaluate the several rules:

Allen, *The Rule of the A.L.I.'s Model Penal Code,* 45 Marq. L. Rev. 494 (1962); Raab, *A Moralist Looks at the Durham and M'Naghten Rules,* 46 Minn. L. Rev. 327 (1961); Slovenko and Super, *The Mentally Disabled, The Law, and The Report of the American Bar Foundation,* 47 Va. L. Rev. 1366, 1384 (1961); Cavanaugh, *Problems of a Psychiatrist in Operating Under the M'Naghten, Durham and Model Penal Code Rules,* 45 Marq. L. Rev. 478 (1962) and Dearman, *Criminal Responsibility and Insanity Tests, A Psychiatrist Looks at Three Cases,* 47 Va. L. Rev. 1388 (1961). See especially, Diamond, *From M'Naghten to Currens, and Beyond,* 50 Cal. L. Rev. 189 (1962).

219 See Dession's, *Final Draft of the Code of Correction for Puerto Rico,* 71 Yale L.J. 1050, 1092 (1962).

based on a manifested inability to assimilate and conform with community expectations.

For the present, however, we can restrict our task to the identification of persons with *serious* mental disorders who are brought into the criminal process. The word *serious* will vary with time and individual interpretations. At present, the criteria for serious mental disorder might be *an illness which so lessens an individual's capacity for control that he is unable to make responsible decisions about his ordinary affairs and is likely to cause injury to himself or others.*[220] The potential threat of harm to property could be a part of "responsible decisions about his ordinary affairs." Emphasis is placed on the individual's ability to form positive, or at least non-destructive (neutral) relationships with others.

Like all verbal formulations, this one has an inherent lack of precision. "Likely to," for example, should mean a "reasonable probability" based on an empirically validated, expected response. There is no pretense of originality in offering this formulation since it is typical of many involuntary civil commitment statutes.[221] There is a conscious preference stated for equating the test of criminal irresponsibility with the test for an involuntary civil commitment. Any person who would have been given "in-patient" treatment in a recognized hospital, without his consent, would seem to be sufficiently disordered to avoid the ordinary criminal processes.

B.

Criminal responsibility should not attach to persons who suffer from serious mental disorders. Enough has been said previously to indicate that the prevalent rules seem inadequate to the task of identification of such persons.[222] The present conceptual framework of the defense of insanity will allow the state to detain and treat a mentally ill offender. Existing facilities, however, are simply not prepared to provide custody and treatment for a large segment of our offender population.

The state must begin to expand and diversify its institutions to accommodate larger numbers and provide a variety of custody and treatment devices. Turning existing hospitals into prisons is hardly a solution. The movement must be toward expansion and diversification of facilities.[223]

If a totally non-punitive system of criminal law were adopted, we would not be concerned about the serious unofficial consequences of labeling a man "criminal."[224] The moral condemnation

220 See Group for the Advancement of Psychiatry, Report No. 26, p. 8 (1954). "Sec. 1 Mental Illness shall mean an illness which so lessens the capacity of a person to use (maintain) his judgment, discretion or control in the conduct of his affairs and social relations as to warrant his commitment to a mental institution." The GAP report concludes that the definition of mental illness should be the test for criminal responsibility. This, of course, is the purport of the recommendation made in this article. The Royal Commission on Capital Punishment 1949-53, *Report*, Cmd., No. 8932 at 275-76 makes a proposal very similar to GAP's.

221 See, e.g., Colo. Rev. Stat. §§71-1-1 to 71-1-5 (Supp. 1960).

222 Although the Durham Rule and the Currens Rule should ease the identification task, they continue to exclude many serious cases and present other problems. Durham, for example, stretches the integration of personality concept by requiring a causal connection between the act and the disorder. Currens does not deal adequately with criteria for mental illness and is so abstract that the transition to observational criteria is extremely difficult. Currens, however, seems far more acceptable than Durham. See Glueck, Law and Psychiatry, Cold War or *Entente Cordiale* 105-07 (1962) for an excellent test which meets these criticisms.

223 Until very recently Colorado had an able and far sighted public servant in Dr. James Galvin. His leadership in such efforts could have made them a reality.

224 See p. 332 *supra*.

bound up in the designation "criminal" has serious and prolonged effects.[225] Upon release, an "ex-convict" may pay for his offense on a never-ending installment plan.[226] The moral stigma becomes a focus for social and economic boycott, deprivation of civil liberties and continued police surveillance. While the immediate, visible results of a decision concerning criminal responsibility or irresponsibility may be the same—involuntary commitment—the unofficial consequences would be critically different.

The unofficial consequences of redefining a person as "mentally ill" are not really known. It seems safe to assume that since this label implies a "sick person," the consequences will be different in kind and degree.[227] Furthermore, it is reasonable to assume that the mentally ill person will receive more help in a medically staffed, non-punitive institution than in a penitentiary.

C.

Responsibility is currently decided by a jury. A verdict of sanity means that the jury has decided the defendant deserves punishment rather than help. Curiously enough, the jury is not permitted to know, before deciding, the consequences of their decision.[228] The dimensions of such punishment will be decided by the sentencing judge and the prison officials.[229]

Ideally, the law should identify and clearly articulate the kinds of decisions being made in the criminal process. Of immediate concern are the decisions relating to guilt-affixing and sentencing. It appears that radically different information and skills are needed for these decisions.

The legal process has proven to be reasonably well adapted to reconstructing past events through the adversary system and deciding whether a particular rule was violated. In deciding what to do with a man found guilty of such conduct, the law has been notoriously deficient.[230] There is little in the lawyer's background to prepare him for this decision. He may be sensitive to the moral opinion of the community or responsive to political pressures. Whatever his motivation, the judge will sentence in accordance with his "gut-reaction" to the offense and offender and his conscious or unconscious evaluation of his own potential gain or loss.

It is proposed, based on a separation of functions and skills, that a Sentence Imposition and Review Board be established. The Board might be composed of four members, appointed by the Governor, one of whom would be a lawyer, one with experience

---

225 Mr. Justice Clark, dissenting in Robinson v. California, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed. 2d 758 (1962), depreciated the distinction between civil and criminal commitments for narcotics addiction.

226 Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 Yale L.J. 543, 590 (1960).

227 See Parsons, The Social System 436-37 (1951) on the institutionalized expectation system relative to the sick role.

228 Ingles v. People, 90 Colo. 51, 57, 6 P.2d 455, 457-58 (1931).

229 The judge must operate within the statutory limits of the offense. See Scott, *Post-Conviction Remedies in Colorado Criminal Cases*, 31 Rocky Mt. L. Rev. 249 (1959). Prison officials will decide on a cell-block, job, punishment for prison infractions, etc. Placing a prisoner in "the hole" for twenty-one days, without clothing, bedding, or other necessities and feeding him bread and water without a "trial" is permissible. See State v. Doolittle, 22 Conn. Supp. 32, 158 A.2d 858 (1960).

230 See *Seminar and Institute on Disparity of Sentencing*, 30 F.R.D. 401 (1962); *Pilot Institute on Sentencing*, 26 F.R.D. 231 (1959); *Sentencing Institute — Fifth Circuit*, 30 F.R.D. 185 (1962). Gaudet, *The Sentencing Behavior of the Judge*, Encyc. of Criminology 449-61 (1949).

in handling adult prisoners, an experienced sociologist and a psychiatrist.[231] The Board's responsibility should begin the moment that "guilt" is ascertained in a regular judicial proceeding. Their decisions would include the imposition of sentence, the proper institutional assignment, periodic review to ascertain progress, release prognosis and the release decision. Statutory minimum sentences should be retained to protect the non-disturbed deviate whose offense is relatively trivial.

Exhaustive information about an offender must be made available by thorough testing and investigation. A delicate balance must be achieved between the seriousness of the defendant's behavior and condition and the advisability of definite or indeterminate sentences. For example, a dangerous psychotic who is caught stealing a quart of milk is not in the same position as a neurotic murderer. The stated preference would be to increase the use of indeterminate sentences while protecting the rights of even seriously disturbed trivial offenders.

The essential idea is to separate the guilt-affixing decision from the treatment decision; to recognize clearly the need for different skills and information; to erect, maintain and constantly appraise institutions suited for the different functions and to achieve a balance between community sentiment and rational decision-making.

For the immediate and intermediate future, we must be concerned about operating within our present framework. It is proposed that in all cases where a finding of insanity is made, the defendant be given an indeterminate sentence to a mental institution. This, of course, is presently done. A Sentence Review Board should be established to periodically review the case and ultimately decide release, and the conditions of release. Specific criteria for release, missing from the present statute, should be part of the legislation creating such a Board.

The abstract release standards should be (1) the dangerousness of the patient and (2) a medical prognosis of sufficient recovery.[232] "Dangerousness" might be defined in terms of any conduct which would involve a threat of serious harm to property, other persons or himself. There would thus be a close parallel to the admission decision. Reference to felonies and serious misdemeanors could provide a more specific standard.

Greater precision in a release standard may not be desirable. The treating-releasing institution will utilize therapeutic indications and an evaluation of the future threat to community values involved. The Board can closely scrutinize the certifying doctor's basis of opinion and thereby create an exchange of data leading to greater precision.

The prognosis should be in terms of a reasonable probability of recovery and a substantial lessening of any threat of "dangerous" behavior in the future. The concern about repetition should go beyond repetition of the original behavior involved. It is impossible to predict, nor is it really desirable, whether a releasee will violate some regulatory ordinance. The healing arts cannot guarantee ideal,

231 This resembles the California Adult Authority, Cal. Penal Code §5075 (Deering 1949).
232 See Note, *Procedure for the Release of the Criminally Insane — A Suggested Approach*, Wash. U.L.Q. 120 (1962).

or even productive, citizens. They must, however, be certain that there is little chance of serious antisocial behavior by the releasee.

The make-up of this Board should approximate that of the Sentence Imposition and Review Board mentioned earlier.

One serious question which relates to both Boards is whether the judge or the district attorney should have any role in the release decision. From a medical standpoint, it seems illogical. As a practical expediency this would give the community representatives some control and offers assurance to the public.

For the present, to accommodate both interests, the Board's release decision should be final. The district attorney and trial judge should be notified in advance of any release hearing and be permitted to present evidence to the Board.[233] If the Board decides to release, the district attorney should have an unqualified right to appeal to the district court. A jury would be impaneled and the defendant awarded a presumption of sanity based on the Board's decision. The decision would be admissible in evidence. The district attorney would be required to show, by a preponderance of the evidence, that the patient is "dangerous" and the prognosis for recovery not sufficiently definite to justify release.

D.

Another major goal involves the fostering of meaningful communication between law and psychiatry. At present we do not properly use the psychiatrist; we ask the wrong questions and receive the wrong answers. We treat insanity as though it were a clinical reality instead of a manipulative label.

Reform need not, and indeed should not, mean the re-allocation of important decisions to the psychiatrist. If we prohibit the question whether the accused knew right from wrong, we diminish the area of his decision-making responsibility. This is the moral question which exactly parallels the ultimate issue involved and it should no longer be asked, irrespective of whether other changes are made.

It is not desirable to have the psychiatrist communicate exclusively in his clinical language. His specialized terminology has, no doubt, great value in the decision-making context of private therapy. It has doubtful value in other settings.

It is proposed that we revise the psychiatrist's function, the questions asked him and the language of his reply. Functionally, he should be *advisory* on the question of triability of the accused and on questions of release; he should be *informative and advisory* on the question of appropriate disposition of the accused; and he should be *instrumental* in creating and providing techniques for changing persons in the direction of self-awareness and reform.[234]

On the question of "appropriate disposition," the doctor should be questioned concerning diagnosis, prognosis, treatability and availability of treatment. In providing information here, and on any

---

[233] The judge could, for example, write a letter expressing his views rather than appearing in person. The district attorney would be the more likely advocate in opposition to release.

[234] See Roche, The Criminal Mind 271 (Evergreen ed. 1959).

other issue, the doctor need not be asked whether the defendant is neurotic, paranoid, schizophrenic or an organic reaction type. Questions he might be asked include: (1) Describe all the symptoms involved. (2) What is the propensity for destructive behavior? (3) What is the relation between the illness and the behavior in question? (4) What is the probability of this person behaving in such-and-such a manner under specified conditions? (5) How probable is it that these conditions will occur? (6) On what do you base these estimates? (7) What have been your opportunities, as well as those of your colleagues whose views you take into account, to validate estimates of this sort?[235]

These questions are, of course, incomplete and merely offered as illustrative. The phraseology of the doctor's response would, in part, be controlled by the function being performed; the question itself and the questioner.

The doctor who is untrained or inexperienced in psychiatry should be precluded from playing an influential role in this area. If psychiatric specialists are available, they must always be preferred. If a physical evaluation is necessary then, of course, the matter is entirely different.

The lay witness, one who is untrained in psychiatry, psychology or physical medicine, should have an extremely limited participation. He should never be asked his opinion on sanity or insanity. If he has observational data available, then this might be communicated to the clinical specialist who desires it, and the jury.

Whatever system of selection of experts is used, there should be the freest exchange of data between *all* the participants. A doctor's data and opinion should not be the exclusive property of anyone. The doctor should be free to form his opinions and answers for a judicial or Board appearance in exactly the same way he would in his clinical environment. The hearsay objection about third-party reports, consultations and evaluations could be abandoned. Close questioning and free pre-trial exchange of data would afford all the protection necessary.

Several areas touched upon previously have not been specifically referred to in this section. Such problems as partial responsibility, conditions of compulsory examination, burdens of proof, and varying definitions of insanity would seem to be met by some of the more abstract proposals. In some instances, an earlier expression of opinion makes the writer's feelings clear.

There is no pretense at complete coverage of all the problems involved, nor is it believed that all the solutions are feasible or desirable. The current interest in the problems of criminal responsibility is a sufficient excuse for an attempt to deal with them in an objective, if not idealistic, fashion. Further research and legislative interest in the problems posed would be an adequate reward for this effort.

---

235 Several of these questions are suggested by the late Professor Dession in his letter of transmission of his Code of Correction to the Puerto Rican authorities. See 71 Yale L.J. 1050, 1090 (1962).

APPENDIX

*Smeltzer, *Insanity as a Defense in Murder and Lesser Crimes*

MURDER

	1957	1958	1959	1960	1961
Charges	14	24	33	24	26
Insanity Plea	6	8	12	7	8
Defense withdrawn before trial	2	2	5	3	2
Insanity issue submitted to jury	4	6	7	4	6
Found insane and committed to hospital	3	4	6	3	5

RAPE[1]

	1957	1958	1959	1960	1961
Charges	28	35	26	34	15
Insanity Plea	1	3	1	3	2
Defense withdrawn before trial	1	1	0	2	2
Insanity issue submitted to jury	0	2	1	1	0
Found insane and committed to hospital	0	2	1	1	0

LARCENY[2]

	1957	1958	1959	1960	1961[3]
Charges	118	134	185	349	499
Insanity Plea	8	6	4	26	26
Defense withdrawn before trial	4	6	4	19	17
Insanity issue submitted to jury	4	0	0	7	6
Found insane and committed to hospital	3	0	0	6	6

* Third-year law student, University of Denver. This study grew out of a Seminar in Law and Behavioral Sciences conducted by the author. See the earlier discussion of this study at p. 333 and notes 56 and 61 *supra*.

1 Report included statutory rape. It did not include assault to rape, indecent liberties, or unnatural carnal copulation.

2 Report included larceny by bailee and larceny of mortgaged property. It did not include conspiracy to commit larceny or petty larceny.

3 This study was completed September 1, 1962. The defense of insanity was entered in three cases and trial was set for a date later than September 1, 1962.

BURGLARY[4]

	1957	1958	1959	1960	1961[5]
Charges	248	317	341	310	407
Insanity Plea	18	14	26	30	21
Defense withdrawn before trial	15	9	22	21	11
Insanity issue submitted to jury	3	5	4	9	9
Found insane and committed to hospital	3	3	4	6	7

FORGERY[6]

	1957	1958	1959	1960	1961[7]
Charges	33	58	74	76	101
Insanity plea	1	7	5	16	8
Defense withdrawn before trial	1	7	4	10	4
Insanity issue submitted to jury	0	0	1	6	3
Found insane and committed to hospital	0	0	0	3	2

4 The report did not include conspiracy to commit burglary, attempted burglary, or breaking and entering a motor vehicle.

5 See note 3 *supra*.

6 The report did not include "no account" check charge or conspiracy to commit forgery.

7 This study was completed September 1, 1962. The defense of insanity was entered in one case and trial was set for a date later than September 1, 1962.

THE MORTGAGING OF LONG-TERM LEASES

BY HOWARD E. THOMAS*

The primary difficulty in presenting a paper on this type of subject is getting started. Ideally, the writer traces the origins of the subject back and back into the common law, so that the reader may be awed by its antiquity. He outlines a frame of reference within which the subject is to be presented so that the reader may comprehend how important the matter is. He limits the scope of the presentation to avoid being accused of having overlooked vital aspects of the subject.

With your indulgence, I shall forget all that. I shall assume that you know what a leasehold mortgage is and are cognizant of the fact that the lease itself is a most important part of the mortgage transaction. I shall proceed to examine the lease. Toward the end of the paper, I shall briefly consider the provisions which may distinguish a leasehold mortgage from a fee mortgage.

THE LEASE

The increasingly frequent use of the long-term lease results from the situation in which a landowner desires to retain his property for a steady return but cannot, or does not wish to, incur the expense and risk of improving or managing the property for tenants' use; and a prospective tenant does not wish to invest his funds in land, preferring to pay rent therefor, but is willing to erect the necessary improvements for his own use, which may be for leasing to others, and take the economic risks which that use entails. The lender, by leasehold mortgage, is able to reduce the amount of the tenant's immediate investment still further. This is not the only factual situation which is presented for leasehold financing, but it is the most common one.

With respect to the lease terms, the tenant and the leasehold mortgagee have a substantial identity of interest. However, in negotiating a lease, a tenant's attitude is one of optimism, a basic assumption that the operation for which the lease forms the basis will be a success. On the other hand, the lender, no matter how enthusiastic the borrower's prospects, must have some measure of pessimism or he would not require a lien on the lease as security for repayment of the debt. In other words, the mortgagee's interest in the lease provisions is based solely on the assumption—intellectually if not emotionally—that there will be trouble. Therefore, the likelihood is small that a mortgageable lease will be presented to a prospective lender unless at the time of preparing the lease both the landlord and tenant, or at least their counsel, recognized that leasehold financing was contemplated or at least possible, and kept in mind the natural requirements of a lender. Tenant's counsel must know at what points the lender will not be satisfied with less advantageous terms which the tenant might be willing to accept as part of an overall bargain. Landlord's counsel must realize that the tenant's insistence on certain provisions as neces-

* Associate Counsel, The Equitable Life Assurance Society of the United States.

sary to satisfy the requirements of some future lender is justified and not merely a gambit in the trading.

Where this understanding has not been present in lease negotiations, the need for renegotiation is a foregone conclusion. No one relishes it. It is time-consuming and costly—particularly to the tenant. At best, the landlord has the unhappy feeling that the tenant is renegotiating behind the back of the mortgagee—indeed the mortgagee's counsel is frequently put in the undesirable position of bargaining directly with landlord's counsel—and, at worst, the landlord insists on an expensive *quid pro quo* for adjusting his

rights to the requirements of the mortgagee. The justification for presenting this subject to a group of lawyers, who are more likely to represent landlords and tenants than lenders, is the opportunity to outline the requirements of the mortgagee to the parties to the lease, with persuasive explanations and suggestions.

What does the mortgagee want? Speaking broadly, he wants his security to continue in existence as security until the loan has been repaid; and in the unfortunate event of his having to realize on the security, he wants to be able to use it or sell it, unfettered by restrictions which would lessen its value for use or sale. The foregoing is true of security transactions in general. What is its peculiar pertinence to leasehold mortgages?

I. EXISTANCE AND CONTINUANCE OF LEASE AS SECURITY

1. *Mortgageability.*—Of primary interest to the mortgagee is the knowledge that he has security, that the lease is mortgageable. In every jurisdiction a lease interest may be mortgaged by the tenant unless restricted by lease provisions. Obviously if the lease prohibits mortgaging, there's an end to it.[1] And if mortgaging is permitted within limitations, they must be honored. A difficult point arises when the lease is silent on mortgaging but prohibits assignment. Unless the law of the jurisdiction is clear that a mortgage is not an assignment within this context, the landlord must be required to remove the ambiguity. The risk, of course, is greatest in states which follow the title theory of mortgaging.

2. *Length of term.*—The term of the lease must be at least as long as the term of the mortgage. Otherwise the security will have disappeared before the loan is paid. For the same reason, the loan must be completely amortized during the term of the lease. But it will be apparent that unless the lease term extends a reasonable time beyond mortgage maturity, the mortgagee will have no cushion or period of time to make up any loss if foreclosure becomes necessary. No mortgagee would lend without such cushion and therefore the term of the lease may not be established by the landlord and tenant without considering the probable period of repayment of the tenant's borrowing. The New York Insurance Law which, incidentally, did not permit insurance company investment in leasehold mortgages until 1951,[2] requires that the loan be completely amortized during four-fifths of the lease term, but in no event within more than 35 years.[3]

Under the New York Insurance Law, renewal options enforceable by the tenant may be counted to extend the lease term.[4] As indicated hereafter, the mortgage will require the tenant to permit the mortgagee to exercise any such option in the name of the tenant on the tenant's failure, and unless it is clearly unnecessary by reason of lease terms or local law, the landlord should be required to agree to recognize such exercise by the mortgagee. Some careful

1 The more sophisticated landlord recognizes the existence of a leasehold mortgage as additional financial assurance that the lease will be performed.

2 New York Insurance Law § 81 - 6a refers to the "conventional" investment provisions.

3 New Jersey and Massachusetts have statutes permitting insurance companies to invest in leasehold mortgages on somewhat similar terms. See 17 N.J. Stat. Ann. § 24 - 1(c) (Supp. 1962); 175 Mass. G. L. § 63(7) (1958).

4 Curiously, the New York Banking Law § 235 - 6i does not permit renewal periods to be counted.

mortgagee attorneys prefer to rely on a renewal option, even though its exercise can be assured. There is at least one decision[5] in which an equity receiver of the landlord's property was upheld in refusing to accept the tenant's exercise of its option to renew, on the ground that the property would be more valuable to the landlord's estate without the tenant and the receiver was not bound to perform the debtor's (landlord's) executory contract. While there may be doubt whether the case is good law,[6] the mortgagee should insist that the original term be sufficient to pay out the mortgage. Beyond that, if there is room for negotiation, the mortgagee may well request that the term be made to include the renewal periods, but with comparable cancellation provisions in favor of the tenant. Such a change should not be considered material by either the landlord or the tenant, unless the tenant's tax expert feels that leasehold improvement depreciation could be more rapid with a relatively short term subject to renewal than with a longer term subject to cancellation.[7]

3. Termination for Tenant's Default.—Perhaps the lease provisions most dangerous for the mortgagee are those which afford the right to terminate the lease in the event of the tenant's default or the tenant's bankruptcy or other occurrence reflecting on the solvency of the tenant. Such provisions afford the landlord a protection which is not unreasonable. And a tenant who is not thinking of borrowing may well acquiesce in the landlord's argument that if the tenant receives appropriate notice and has adequate grace periods in which to cure any default but fails to do so, the landlord should be entitled to terminate the lease. This is all very well for a tenant who, by and large, can prevent defaults or cure them. Not so for a leasehold mortgagee.

We may assume that any landlord who is willing to permit a mortgage on the lease will readily agree to notify the mortgagee as well as the tenant of any default and to permit the mortgagee to cure the default before the landlord elects to terminate. He should also agree to recognize curative action by the mortgagee as action by the tenant. But that is not enough. An analysis of the normal long term lease is likely to disclose three different types of

5 Coy v. Title Guarantee & Trust Co., 198 Fed. 275 (D.C. Ore. 1912).
6 See Orr v. Doubleday, Page & Co., 223 N.Y. 334, 119 N.E. 552 (1918).
7 There may be one minor advantage to the mortgagee in "shorter term plus" renewals. Colo. Rev. Stat. § 118-9-7 (1953) precludes any right of redemption if the mortgaged lease has less than ten years to run.

possible default (or occurrences in the nature of default); different, that is, from the mortgagee's point of view.

First is the type the mortgagee can cure only if he knows about it and has time. Examples are non-payment of rent or taxes or failure to furnish insurance—unless, of course, the tenant's conduct has rendered the premises uninsurable.

Second, the type the mortgagee can cure but only if the mortgagee can legally take possession of the property, either directly or through a receiver. A typical situation would be the failure to make repairs or to comply with governmental requirements.

Finally, the default which the mortgagee can cure only by foreclosure or cannot cure at all. For examples, an assignment or subletting contrary to the provisions of the lease, the bankruptcy of the tenant, or the failure of the tenant to furnish required statements to the landlord.

The New York Insurance Law (Section 81-6a) requires that for a leasehold loan to be legal, there be "no condition or right of re-entry or forfeiture not insured against . . . under which, in the case of leaseholds, the insurer [mortgagee] is unable to continue the lease in force for the duration of the loan." This would be a requirement of any reasonably careful mortgagee's attorney. In other words, since the lease is the sole security for the loan, the mortgagee must be able to keep the lease alive, "no matter what." Now, how to implement this requirement? Obviously the problem will be reduced to the extent the lease is modified to reduce the number of possible events of default. Although some covenants, to be discussed later,[8] are inherently objectionable to the mortgagee, it is not believed the mortgagee is justified in requesting their elimination, provided other protection is furnished.

Protection against termination because of the first type of default mentioned—defaults which can be cured by the mortgagee without taking possession of the property—is quite simple. The landlord must agree that before exercising a right to terminate the lease he must give notice of the default to the mortgagee either at the same time as to the tenant, or later, and must give the mortgagee time in which to cure the defect. Preferably, but not necessarily, the mortgagee's grace period should be longer than the tenant's; otherwise the mortgage should shorten the tenant's period.[9] The length of the mortgagee's grace period should take into consideration the risk of institutional slowness and occasional inefficiency. Two weeks should be considered an absolute minimum. Finally, the landlord is entitled to have it specifically stated how his notice to the mortgagee is to be given.

The second category of defaults—those which the mortgagee can cure, but only by being in possession of the property—should be handled in the same fashion, except that instead of the mortgagee having a stated time in which to cure he should have whatever time is necessary to obtain possession and cure, including possession following foreclosure if necessary, provided he has started promptly after the tenant's grace period has expired and continues with due diligence. For the landlord's benefit, lease

8 See paragraph II.3, *infra*.
9 See paragraph III.c, *infra*.

language should be carefully selected so that the prohibition on the landlord exercising his right to terminate relates only to the default in question, without impairment of remedies for any other default which may occur. Conversely, careless language can hurt the mortgagee by conditioning the prohibition on the continued performance of all other covenants—without reference to notice of any default and opportunity to cure.

The third category—those which can be cured by the mortgagee only by foreclosure and the exclusion of the tenant, and those which simply cannot be cured by the mortgagee—should be handled by the lease providing that the landlord will not terminate so long as the mortgagee, after receiving appropriate notice and after the expiration of the tenant's grace period, takes prompt and continuously diligent steps to foreclose. The landlord is fairly entitled to require the mortgagee to notify the landlord that he is proceeding to foreclose. On the other hand, the mortgagee should not be required to continue if the default is cured.

So vital to the loan is the existence of the lease that in recent years, in projects of major importance, mortgagees have been requiring that the landlord agree that, if the lease is terminated for the tenants default, the landlord will give a new lease to the mortgagee on the same terms for the balance of the term, provided all curable defaults are cured. If there be more than one mortgagee, the right is to be exercised in accordance with lien priorities. The right to obtain a new lease is a fine second string to the bow in case of a slip. It may also have the advantage of the mortgagee in effect acquiring the security without the expense and delay of foreclosure and redemption. In the absence of decisions, however, it would be no surprise if the courts found means to protect the mortgagor-tenant from losing his estate to the mortgagee through the summary action of a landlord-tenant proceeding. It has been suggested that the "new lease" method is a device favored by landlords to avoid involvement in the tenant's bankruptcy proceeding.[10] Whether or not it would have this effect, the writer does not believe the right to a new lease is a proper *substitute* for the right to prevent the lease from being terminated. There is some doubt as to whether the ability to obtain a new lease is the equivalent of the ability "to continue the lease in force," within the meaning of the New York Insurance Law. There are

10 See Mark, *Leasehold Mortgages—Some Practical Considerations*, 14 Business Lawyer 609 (1959).

two substantive objections to the mortgagee agreeing in advance to rely for protection solely on a new lease. In the first place, it substitutes for an existing lease a right of action for specific performance of an agreement to give a lease. And the right to enforce such a covenant in the event of bankruptcy of the landlord is subject to at least the same risk, if not a greater one, as is the right of a tenant to enforce a right to renew the term, discussed in subsection 2, above. Furthermore, we cannot be positive that the new lease will not be subject to liens attaching to the fee subsequent to the original lease.

4. Termination by Third Parties.—Needless to say there should be nothing in the situation by which the lease could be destroyed by anyone other than the landlord, so long as its terms are fulfilled.[11] Therefore, although there is nothing in leasehold mortgage financing to preclude a mortgage on the fee, any such mortgage and any other existing lien on the fee must be subordinated to the lease, and, of course, the lease may not contain any provision subordinating the lease to a fee mortgage. Some fee mortgagees, while recognizing the justice of a tenant and a tenant's mortgagee insisting that the lease be free from the risk of being cut off by a prior fee mortgage, nevertheless, insist on having a prior lien, but offer to include in the fee mortgage a "non-disturbance" clause by which the lease will be preserved nothwithstanding the foreclosure of the fee mortgage, provided the tenant continues to perform the lease covenants. This should not be objectionable in principle to the tenant or the leasehold mortgagee. But the tenant (and his mortgagee) must be wary at two points. Careless language in the non-disturbance clause and default by the tenant will find the lease cut off by foreclosure of the mortgage despite safeguards incorporated in the lease against termination by the landlord. Secondly, unless the rights of all parties in such situations as condemnation or damage by fire or other casualty are clearly spelled out in the fee mortgage as well as the lease and leasehold mortgage, the tenant and leasehold mortgagee may be at a distinct disadvantage vis-a-vis the prior fee mortgage.

If it is necessary to record the lease as well as the mortgage to put third parties on notice, such recording must be effected. In some jurisdictions a lease is regarded as personal property, and therefore a leasehold mortgage is recorded as a chattel mortgage. In Colorado, a lease of real property appears to be unquestionably real property,[12] and therefore the mortgage must be recorded as a real property mortgage.

Finally, in the unlikely situation of the landlord rather than the tenant having the obligation to pay taxes, the tenant should have the right to pay them on the landlord's default and to deduct the amount from rent.

5. Property Damage or Destruction.—Two other methods by which the security may be destroyed or seriously impaired are fire or other casualty, and condemnation. In both situations, the relative interests of the tenant and the mortgagee are the same

---

11 Condemnation is an exception, discussed in Paragraph I.6, *infra*.

12 Routt County Mining Co. v. Stutheit, 101 Colo. 254, 72 P.2d 692 (1937); Bonfils v. McDonald 84 Colo. 325, 270 Pac. 650 (1928); McKee v. Howe, 17 Colo. 538, 31 Pac. 115 (1892).

as those of a fee owner and a fee mortgagee—except that in the case of a leasehold they are affected by the landlord's rights, either as provided in the lease or as given by law.

In considering damage or destruction, the mortgagee will have insisted on the tenant carrying adequate insurance, whether or not the lease does.[13] A mortgagee clause will be required. The mortgage will provide that the proceeds either go to reduce the mortgage debt, be held by the mortgagee to be repaid to the tenant as rebuilding progresses or, in the case of small losses, be turned over to the tenant directly. Except for small losses, the mortgagee will insist on participating in any settlement. Now, what of the lease? Unless the tenant is willing to duplicate insurance, which is highly unlikely, nothing in the lease must be allowed to interfere with any of the foregoing, except that the mortgagee need not require insurance money to be deposited with the mortgagee if there is adequate assurance that the proceeds will be used for restoration. For this purpose the parties frequently provide for an insurance trustee to hold and and pay out the proceeds. Whether the landlord should be allowed to hold the proceeds instead of a trustee depends, of course, on who the landlord is. The fact that the original landlord will be satisfactory for this purpose doesn't mean that his successor necessarily will be. Frequently the landlord is agreeable to the leasehold mortgagee holding the proceeds in lieu of a trustee so long as it is an institution of a type satisfactory to the landlord. This saves expense, and the leasehold mortgagee feels that the obvious advantages of supervising the payout outweigh the trouble of administering the fund. Incidentally, notwithstanding an agreement that insurance proceeds are payable to a trustee, the mortgagee will require a mortgagee clause on the policy to be sure of receiving any notice of cancellation and to be protected against the policy being invalidated by act or omission of the insured landlord or tenant.

6. *Condemnation.*—In any substantial lease the condemnation clauses are usually among the most difficult of agreement. The fact that they are also likely to be the most academic doesn't relieve counsel from the need to wrestle with them. The injection of a leasehold mortgage merely adds another set of ideas and

13 Except for reproduction insurance and rent insurance in the circumstances mentioned in Paragraph III.A, *infra*, the types or amounts of insurance to be carried by the tenant are beyond the scope of this paper, because the fact that the security is leasehold instead of fee does not change the interest of the mortgagee.

prevents the tenant's attorney from giving in to the landlord's lawyer quite so soon. To do some justice to the subject would require a paper at least as long as this.[14] In this field there are no set rules or patterns. Consideration must be given to the likelihood of condemnation, total, partial or temporary, who erected the improvements, the basis on which rental has been determined, the relative importance to the tenant of vacant land, whether the tenant has leased for use or for an income producing investment, how easily the tenant's use can be accommodated in smaller or revised quarters in the event of partial taking, the effect of partial condemnation toward the end of the term on the tenant's desire to rebuild and remain, the state and federal laws and decisions in these areas. Unless the landlord has negotiated unreasonable advantages over a tenant who has faith that "condemnation won't take place anyway," the mortgagee may have difficulty. Perhaps in the case of total condemnation the mortgagee should be satisfied with the share of the award which a court would allow to the tenant without lease clauses, although peculiar local law may give the mortgagee's counsel some second thoughts. But in the case of partial condemnation, the lease should not be allowed to terminate unless the mortgage has been paid in full, and any award for the building should be used to restore the building. As to the distribution of any remaining award and any rent reduction, the circumstances of each lease and future possibilities thereunder are so different that it is not possible to furnish any guide-lines except to be as fair as possible to all parties. Here, however, the landlord should bear in mind that in all probability the mortgagee has largely financed the improvements, and that the mortgagee's investment was in a fixed amount and, contrary to that of landlord and tenant, involved no possibility of speculative appreciation. Therefore it would not be inappropriate, in some situations, for the landlord to subordinate its interest to that of the leasehold mortgagee to a greater extent than it would that of the tenant.

7. *Liability of Mortgagee on Lease Covenants.*—In a minority of jurisdictions, states holding to the title theory rather than the lien theory of a mortgage, it has been held that a leasehold mortgagee, being the assignee of the lease, is liable on the lessee's covenants even before taking possession of the property.[15] Colorado, following the lien theory, is to the contrary.[16] Regardless of the theory of a mortgage, the thought of being personally liable for performance of the lease before being entitled to the income from the property is repugnant to the mortgagee. As a security holder, he may be willing to make further advances to protect his security, but he wants to be able to drop it in preference to going to further expense to protect it if that seems the proper course. Certainly,

14 For an extensive article on leasehold condemnation which does not, however, reach a discussion of the mortgagee's position, see Polansky, *The Condemnation of Leasehold Interests*, 48 Va. L. Rev. 477 (1962).

15 These jurisdictions are given in an annotation in 73 A.L.R.2d 1118, 1121 (1960). They are Maryland, New Hampshire, and Massachusetts. A sport in the law is Rodack v. New Moon Theatre, 121 Misc. 63, 200 N.Y.S. 237 (1923), in which, although New York follows the lien theory of a real property mortgage, the court held that a lease was a chattel, that a mortgage on personal property transferred title to the property, and that therefore the mortgagee was the assignee of the lease. This was not a question of the liability of the mortgagee on the lease, but of whether a leasehold mortgagee had to be made a party to a proceeding to dispossess the tenant for breach of the lease.

16 Fidelity Bond and Mortgage Co. v. Paul, 90 Colo. 94, 6 P.2d 462 (1931); Bonfils v. McDonald, note 12 *supra*.

the landlord has no logical claim to the added personal liability of one who has only made a loan to the tenant. The case is stronger for the landlord and weaker for the mortgagee when the mortgagee has taken possession. Even here, however, probably a majority take the view that a mortgagee, even in possession, is not liable on the tenant's covenants prior to an assignment on foreclosure.[17] In any jurisdiction in which there is risk, the morgagee's personal liability when not in possession should be negated, and when in possession but prior to foreclosure should be limited to the proceeds of the property after taxes and operating expenses.

17 See 73 A.L.R.2d 1118, 1131 (1960); Note, *Real Property-Mortgages—Liability of Mortgagee of Lessee's Term for Rent*, 58 Mich. L. Rev. 140 (1959).

II VALUE (USEFULNESS AND SALEABILITY)

The foregoing considerations have related to lease provisions necessary to assure the continuance of the lease as security. The mortgagee's interest in such provisions is immediate. It commences when the loan is made. We come now to a group of provisions which may affect the value of the lease in the hands of the mortgagee in case the mortgagee forecloses.[18] In this area, the mortgagee's interest is dormant, so to speak, until foreclosure, except to the extent that restrictions on the tenant's use and operation may interfere with the tenant's income from the property and ability to pay mortgage charges. As a matter of fact, if the landlord insists, the effectiveness of any lease modifications made in this category to satisfy the mortgagee's requirements may appropriately be limited to the period following foreclosure. However, by that time they must become permanent. Their period of effectiveness cannot be limited to the period of the mortgagee's interest in the lease.[19]

When asked to agree to such provisions for the benefit of the mortgagee which he has not agreed to, or perhaps would not agree to, for the benefit of the tenant, the landlord should bear in mind that if a lender must take over the security it is probable that the utility of the security has not lived up to the expectations of either the borrower or the lender—or the landlord, for that matter—and the lender is in the position of having to undertake a salvage operation. He cannot be hampered by restrictions which might have seemed reasonable to the tenant.

1. *Estoppel Certificate by Landlord.*—It is a rare lease which does not provide for a tenant to furnish an estoppel certificate on request, to aid the landlord in the sale or mortgage of his fee interest. The same considerations should suggest to the tenant the possible need for the landlord to furnish a similar certificate. If the lease does not already require it, the mortgagee should insist that it be modified to provide that the landlord certify to any assignee or mortgagee of the lease or the assignee of any mortgage (i) that the lease and any specified modifications constitute the entire lease agreement; (ii) the date to which rent and other charges have been paid; (iii) that no notice has been sent to the tenant of any default which has not been cured; and (iv) that, so far as the person making the certificate knows, the tenant is not in default under the lease.

2. *Rental.*—Usually a lease to be mortgaged is a net, or substantially net, lease.[20] The rental is fixed, although possibly graduated. The amount of rent has a direct and paramount bearing on the value of the leasehold, whether for determining the amount to be loaned thereon, or determining a price to be paid therefor. Any deviation from a fixed rent creates uncertainty in the mind of an appraiser, with a consequent depreciation in value. However, there can be variations in rental which are not necessarily objectionable.

18 "Value" is here used to encompass not only "usefulness" if the lease is retained by the mortgagee, but also all of the elements which would affect the saleability of the lease and the price to be received.

19 See Paragraph II.4, *infra*.

20 In the writer's opinion, there is no distinction between a "net lease", an "absolutely net lease" and a "net net lease". Under a lease the rent is either "net" to the landlord or it isn't. The term "substantially net lease" indicates one in which the tenant's obligation to bear the expense of the property is limited in some minor respects, usually not with respect to real estate taxes or insurance premiums.

Even a net lease, particularly a very long term one, may provide for periodic redeterminations of rental, usually upward only, based upon some financial index or upon a reappraisal of the value of the leased property. The leasehold mortgagee should not object to such provision for redetermination, provided any resulting increase in rent will result from factors which it may be reasonably anticipated will have caused a substantially comparable increase in value in the leasehold, and provided the method and standard of redetermination be sufficiently precise to be enforceable. For example, a simple provision that the rent shall be fixed by arbitration, without giving the arbitrators any standard to go on, would undoubtedly be unenforceable, and might invalidate that part of the term of the lease to which it applied. Incidentally, when the value of the property is to be the basis of the changed rental, the lease should specify that the value should be found without reference to the existence of the lease itself.

Although the usual lease presented for mortgaging is a net lease, there is no reason why a gross lease, with or without escalation of rent, cannot be mortgageable. It is basically a matter of valuation. Of course, if there be escalation the mortgagee must be satisfied that the escalation provisions are workable and how they will affect value.[21]

3. *Limitation on Assignability and Subletting—Use Restrictions.*—A most troublesome restriction, troublesome because of its importance to the landlord, is the prohibition on assignment without the landlord's consent. The purchaser of the lease on foreclosure, whether the mortgagee or a third party, must not be required to obtain the landlord's consent to assign any more than could the purchaser on foreclosure of a fee mortgage be required

21 The escalation provisions in which a leasehold mortgagee is interested are less likely to be found in the lease being mortgaged than in the subleases which contribute to the value of the mortgaged lease. In this respect the mortgagee's interest is no different from that of a fee mortgagee, and is therefore not within the ambit of this paper. This may be fortunate because of the extent to which this paper would have to be expanded to accommodate the subject. There are few legal articles on the subject, perhaps because of the comparative newness of the widespread use of escalation in leases. Legal considerations rarely cause difficulties, but once the parties decide what is to be considered in the escalation, counsel are then required to exercise a high degree of drafting ability to express properly not only what is to be escalated, but how it is to be escalated. Expressing the escalation of taxes is relatively simple, although even here there may be difficulties with the definition of taxes, the determination of the base, particularly if the building has yet to be erected, an understanding as to who as between landlord and tenants may make application for reduction of assessments and who are to pay for such proceedings. But in the case of operating expenses, in addition to determining the base period for escalation, there is the matter of pro-ration between tenants requiring different services, the question of how to handle vacancies which may or may not reduce the total of operating expenses, how to provide for the type of expenses which should be included but will come into existence perhaps 10 years hence and cannot be imagined now, and finally how to state the formula in such a way as to include everything the parties have agreed to and exclude everything they haven't, without detailed itemization. Some lawyers have found this to be impossible with the result that leases have been lengthened by pages to take care of such itemization. Also, the need to permit tenants to examine the landlord's books and the procedures to be established for such examination are by no means easy tasks for the lawyer. In an endeavor to simplify procedures for the escalation of operating expenses in office buildings (the type of building most readily lending itself to escalation) some landlords and tenants have agreed that in addition to the sharing of tax increases, the rent would also be escalated on the basis of an independent standard relating to operating expenses. One standard might be the figures of the Building Owners and Managers Association relating to the city in which the property is located. Another would be city-wide wages resulting from union negotiation. In the latter event the rent would be increased by a certain amount per square foot of rentable space as the wages of the most common type of employee (the porter?) are increased. The theory is that labor costs are the major portion of operating costs, that as labor costs go up other operating costs go up, and that the fluctuation of wages of the most common type of employee are a fair guide to all labor costs. This involves an element of gamble by both landlord and tenant and it is not always easy for them to agree upon the ratio of increase. But once the ratio has been agreed upon, the simplicity of administration over the period of the long term lease may well outweigh any lack of precision in the results of applying the formula.

to obtain some other person's consent to sell the fee. Nor may the limitation be properly reimposed on a subsequent purchase.[22]

But what of the landlord's position? In leasing, he may well have considered the character and financial responsibility of the tenant to be of the utmost importance. But by permitting the tenant to mortgage, the landlord must be deemed to have recognized the possibility of the tenant's defaulting on the mortgage, in which event; (a) although the tenant's lease obligation remains, it would probably have become drastically reduced in value, and (b) the landlord cannot control the identity of the purchaser on foreclosure without rendering the right to mortgage substantially valueless. If then, the lease can be acquired on foreclosure free of control by the landlord, what is the logical justification for reimposing the restriction?

As to financial responsibility, certainly the landlord cannot claim that an important consideration in making the original lease was the ability to insist on a new tenant with satisfactory and financial responsibility if the original tenant should fail. However, a lease provision conditioning the assignment of the lease on the assumption of the lease by the assignee, but permitting the release of the assignee upon further assignment and assumption does not appear to interfere with saleability of the lease. Nor, if the landlord insists, should the mortgagee-purchaser object to assuming the covenants of the tenant so long as he holds the tenant interest. As a matter of law in most, if not all, jurisdictions—the assignee of a lease is responsible under the lessee's covenants by privity of estate so long as he remains in possession.[23] Therefore such limited assumption does not add to the burden of the person acquiring the lease.

The landlord may well have a justifiable interest in the character of the occupancy of his property throughout the term of the lease. However, this interest should be protected by controlling not the identity of the occupant but the character of the occupancy. The lease may properly limit the use to which the premises may be put, including—objectively—the character of the operation. For example, if the nature and location of the improvement justifies it, a mortgagee should not find objectionable a lease requirement that the building be used and occupied only as a high class hotel or office

22 See Paragraph II.4, *infra*.
23 Bonfils v. McDonald, note 12 *supra*.

building,[24] or be managed by an operator with experience in managing high class hotels or office buildings. On the other hand, the purpose of the use of the premises cannot be too limited. Recently we were requested to make a loan on the lease of a small building, "to be used only as a railway express agency office." We understood that there was just one company in the country (the proposed borrower) which conducted such a business.

Similar considerations require that any restriction on subletting also be eliminated after foreclosure so that the mortgagee's ability to realize on his investment be not subject to undue impediment. The mortgagee is usually the purchaser on foreclosure—for obivious reasons. The mortgagee may well be ill-equipped to operate the foreclosed property, with or without a managing agent. Yet the market for the sale of the security may not be good at that time and subletting may be the most feasible course for the mortgagee, or other purchaser on foreclosure, to follow.

A landlord who has an extraordinary interest in controlling both the character of the occupancy and the identity of the occupant, may properly require of the mortgagee a right which will give the landlord complete protection if he is financially able to exercise it. If the mortgagee insists that in order to permit the mortgagee to realize on his investment in the event of foreclosure, the landlord must waive lease restrictions on assignment and subletting, the landlord should have the right, after notice by the mortgagee either to cure any default under the mortgage or to purchase the mortgage from the mortgagee to prevent a sale on foreclosure.

4. *Effective Period of Modification.*—It is not unusual for a landlord to insist that any change in lease terms required by the mortgagee should take the form of an agreement between the landlord and the mortgagee rather than an amendment of the lease.[25] This is a less desirable method of proceeding, but the form of the agreement is not important, provided there is no attempt to limit the benefits of it to the particular mortgage or to the mortgagee or purchaser on foreclosure. A primary purpose of the mortgagee's requests is to make the security valuable for sale. The

24 Care should be taken in definition, so as not to preclude proper incidental uses, such as stores in either hotels or office buildings, or company cafeterias or photographic rooms in office buildings catering to large tenancies.

25 Such an agreement would also appropriately incorporate the landlord's recognition of the limitations imposed by the mortgage in favor of the mortgagee on the tenant's rights under the lease. See Paragraphs III.D, E, F and G, *infra*.

purpose will have been ill accomplished if the advantages negotiated for the benefit of the mortgagee are to disappear in the hands of the first purchaser after foreclosure or any subsequent purchaser.

5. *A Subleasehold Mortgage.*—Occasionally a loan is secured by a mortgage on a sublease. In such event the mortgagee will require the same consideration from the sublessor as a leasehold mortgagee requires from the fee owner. In addition, not only must the primary lease permit the sublease, it must also meet the requirements discussed in paragraph I. 2 through 6, above, to assure the continued existence of the sublease (and the subleasehold mortgage) until the loan has been repaid.

There are however, additional matters to be considered. The fee owner either must agree that in the event of a default under the primary lease which could result in termination, the owner will give the subtenant the opportunity to take over the primary tenant's position (to implement this the sublease should have incorporated a mortgage of the primary leasehold interest to the subtenant), or must agree that in the event of such termination the owner will recognize the subtenant under the sublease continuing in place of the primary lease.[26] If the subtenant's protection is to take over the primary lease on default, it will be necessary to examine the primary lease to make sure that it would qualify as a lease for mortgaging in the other respects discussed in this paper. Also, if the sublease is of only part of the leased premises and the burden of the primary lease is greater than that of the sublease, the subleasehold mortgagee may be unwilling to invest if taking over the primary lease is the only alternative for protection in the event of default.

In any event, bear in mind that the subleasehold mortgagee's rights are dependent entirely on the sublease, so that for the protection of the subleasehold mortgagee the fee owner must agree with or for the benefit of the subleasehold mortgagee in such a way as to give him the opporunity to take over the subtenant's position and protect it if the subtenant does not.

6. *Mortgage on Lease and Fee.*—All of the foregoing difficulties with the lease can be avoided if the fee owner is willing to subject his fee interest to secure the loan to the tenant. Of course, the reason for the landlord taking this action is not to avoid difficulties with the lease. These can be avoided by modification—as indicated throughout this paper—with much less risk to the landlord who, by mortgaging his interest, stands to lose it all if the tenant defaults. The reason he does it is to add to the security being mortgaged and thus qualify the tenant for a larger loan than the lease itself could demand. Thus, whether or not the landlord is required to join in the mortgage, either by the terms of the original lease or by subsequent persuasion of the tenant, is not a legal requirement of the lender. It is a financial or business requirement to justify a larger loan.

The landlord's mortgaging the fee probably avoids the necessity for tinkering with the lease. But it does raise other problems. First, if the landlord is a corporation, is it legal for it to subject its

26 A third possibility is an agreement by the fee owner to give the sub-tenant a new lease equal to the remaining term of the terminated primary lease; but for the reasons discussed in Paragraph II.3, *supra*, this would not be satisfactory to the subleasehold mortgagee.

property to secure money loaned to another? If 100% stockholder consent can be obtained and if there are no, or only minor, creditors of the landlord, the question can be ignored. If the landlord has obligated himself in the original lease to join in the mortgage, that may constitute sufficient consideration to "legalize" the mortgaging. However, if the agreement comes later and the stockholder and creditor situation is not helpful, the lender and his title company should consider whether or not the agreement is *ultra vires*. Perhaps the furnishing of funds to erect a building on the landlord's property, even though the erection of the building be the obligation of the tenant, is sufficient to legally justify the landlord corporation pledging its property for the tenant's debt.

The next question is the form that the morgaging transaction should take. Normally the landlord and tenant join in the same mortgage (with only the tenant liable on the note), the interests are separately described, and a careful draftsman will review the "boilerplate" to make any revision required by these unusual circumstances. Sometimes the mortgage merely describes the property by metes and bounds and is executed by both landlord and tenant, each purporting to mortgage his own interest in the property. In any event, in a jurisdiction in which subleases could be cancelled by the subtenants if the primary lease were cut off in foreclosure, the mortgage will have to provide that the lien on the fee is prior to the mortgaged lease, or the mortgagee will have to have required attornment agreements by important subtenants.

Sometimes the participation of the landlord is referred to as his

"subordinating" the fee to the lease or the mortgage. The use of this term can create a dangerous misunderstanding in negotiations. The lender undoubtedly believes that he is negotiating an agreement by the landlord to mortgage his entire fee interest and risk its loss in the event of non-payment. The lender thus is able to appraise the security as a fee and set the loan terms without regard to the lease. However, there is some indication that by agreeing to "subordinate," the landlord may believe that he is agreeing to mortgage his fee, but *only for the term of the lease.* Put another way, it is in effect an agreement that if the mortgagee forecloses, any subsequent holder of the lease will have it free of rent (and other burdensome restrictions?) for the balance of the term. This is not fatal if all parties understand it; but now the value of the security to the lender, and therefore the amount he is willing to lend, will be substantially reduced, and the lease and mortgage will have to fulfill all the requirements of the usual leasehold mortgage transaction.

III. THE MORTGAGE

Once the provisions of the lease have been satisfactorily resolved, the drafting of the mortgage will be comparatively easy, almost anti-climactic. Speaking generally, most of the standard provisions of a fee mortgage should be found in a leasehold mortgage with little or no change. There are, however, a number of provisions which must be added to a leasehold mortgage. Most of them will be fairly obvious. Few should cause much argument by borrower's counsel. The landlord, of course, has no direct concern with the terms of the mortgage—unless he has agreed to join it. It is considered prudent practice, however, to require the landlord to agree to recognize any authorization granted by the tenant mortgagor to the mortgagee to exercise tenant's rights under the lease. The more common of the distinctive leasehold mortgage provisions in addition to the difference in description, are summarized in the following paragraphs.

A. Conformity with Lease Requirements.—The mortgage itself may not contain provisions inconsistent with those of the lease. Of frequent consideration in this area are the use of proceeds of fire insurance or of an award for a taking in condemnation. However, the mortgage may impose additional obligations on the borrower-tenant if the lease seems inadequate. An example would be a re-

quirement that the tenant furnish additional insurance policies with a standard mortgagee clause, if the lease did not permit one on policies to be furnished the landlord. If the age of the building is such that ordinary insurance might be substantially inadequate to effect the restoration required by the lease, the mortgage should require the tenant to carry insurance on a replacemnt basis to cover physical depreciation. If the lease does not provide for a rental abatement while damage is being restored, the ability of the tenant to continue to pay the rent and other lease charges should be assured by the mortgage requiring the tenant to maintain rent insurance or business interruption insurance.

B. Tenant to Comply with Lease.—The mortgage will require the tenant to agree expressly to perform or comply with all of the covenants of the tenant to be performed under the lease. The lease will have provided for a notice by the landlord to the mortgagee of any default under the lease which could form a basis for termination. If there are other possible notices from the landlord of which the mortgagee wishes to learn, the mortgage may provide that copies be sent by the tenant to the mortgagee. In addition, if the lease clauses are considered inadequate, the mortgage may require the tenant to furnish evidence of payment of ground rent, taxes, etc., before any grace period given in the lease has expired. The mortgage should expressly provide that the failure of the tenant to perform and subsequent performance by the mortgagee will not remove the default as between tenant and mortgagee but that until the tenant shall have reimbursed the mortgagee for the cost of performance, the mortgagee will have the right to accelerate and add the cost to the mortgage debt.

C. Shortening of Tenant's Grace Period under the Lease.—Depending upon the provisions in the lease which require the landlord to give the mortgagee notice of the tenant's defaults and the opportunity to cure them, the mortgage may require the tenant to cure any such defaults within a shorter period than that permitted the mortgagee, so that the mortgagee will have time within which to cure if the tenant does not.

D. Prohibition of Lease Modification or Termination.—The mortgage will, of course, prohibit the tenant from agreeing to any modification or termination or surrender or the lease without the mortgagee's consent. Notifying the landlord of the existence of the

mortgage may be sufficient to prevent the landlord from agreeing to any such modification, termination or surrender, but an express agreement by the landlord is more satisfactory. Incidentally, the lease will probably require the tenant to notify the landlord of any leasehold mortgage and the mortgage will require the tenant to give such notice. The mortgagee should nevertheless be satisfied beyond question that the notice has been given.

E. Control of Arbitration.—If the lease provides for arbitration in any particular aspect, the mortgagee may require the tenant to authorize the mortgagee to represent the tenant in certain areas of arbitration or in certain circumstances. Again, it would be well to have the landlord agree to recognize such authorization.

F. Control of Renewal of Term.—If the tenant has the right to renew the lease, the mortgagee should be authorized to renew on behalf of, and in the name of, the tenant if the tenant fails to renew at any time when the security of the mortgage would be jeopardized by such failure. Again, the landlord should recognize such authorization or it should be clear, as a matter of law, that the landlord cannot refuse to recognize the authorization.

G. Fee Interest Acquired by Tenant to Be Subject to Mortgage. —Any purchase option in the tenant should be covered by the mortgage expressly and although it would be an unusual situation in which the mortgagee would be justified in insisting that the tenant exercise such an option, it should continue with the lease in the event of foreclosure. In any event, the mortgage should provide that if the tenant should acquire the fee of all or any portion of the leased property whether by exercise of a purchase option or otherwise, the fee would immediately become subject to the mortgage and the mortgagor would execute whatever confirmatory instrument might be required. However, provision should be made to prevent a merger of the lease in the fee if, under state law, the consequent disappearance of the lease would permit valued subtenants to effectively claim that the sublease falls with the disappearance of the primary lease.

H. Subleases.—In a majority of large real estate financings the terms of occupancy and the financial responsibility of the occupying tenants are of primary importance, whether the property be an office building, a shopping center, a department store or a post office. We are here concerned, however, only with the aspects of such leasing as may peculiarly relate to leasehold financing. In this context, the occupancy leases are subleases.

First, it should be apparent that the subleases must be integrated with the primary lease and that no rights can be granted the subtenants more extensive than those granted under the primary lease. Indeed, it is not uncommon for the sublease to contain an express stipulation to that effect.

In the second place, if the primary lease provides for a new lease to the mortgagee in the event of termination of the primary lease, as discussed in Paragraph I. 3, any sublease considered valuable by the mortgagee must contain a covenant by the subtenant to attorn to the lessee under any such new lease. Otherwise the sub-

tenant may effectively claim that the sublease and his obligations thereunder fall with the termination of the primary lease. As a matter of fact, a subtenant of a large amount of space may well require the overlandlord to agree that if the lease is terminated and the mortgagee does not obtain a new lease, either the subtenant may obtain a new lease on the same terms as the primary lease or the overlandlord will recognize the continuance of the sublease as a direct lease from the overlandlord. Careful drafting will provide for such recognition by the overlandlord during the period in which the mortgagee is making up his mind whether or not to take a new lease.[27]

CONCLUSION

It is recognized that each lease transaction and each related leasehold mortgage transaction contains elements of individuality which preclude any successful attempt to specify in advance the proper form of the various provisions of the documents. Nevertheless it is hoped that this paper, by furnishing an understanding of how a mortgagee is likely to request that certain more common lease questions be resolved—and why, may somewhat ease the burden of negotiation among landlord, tenant and mortgagee, and their respective counsel.[28]

27 See also the discussion of the subtenant's protection in Paragraph 11.5, *supra*.

28 I must express my debt to the authors of the following articles on this subject. The reader will note that they furnish some differences in opinion and emphasis: Mark, *Leasehold Mortgages — Some Practical Considerations*, 14 Business Lawyer 609 (1959); Kelly, *Some Aspects of Leasehold Financing*, 33 Notre Dame Law., 34 (1957); Hyde, *Leasehold Mortgages*, Proc. Ass'n. of Life Counsel 659 (1955).

CASE COMMENT

CRIMINAL LAW – TESTIMONY OF ACCOMPLICES AND CODEFENDANTS – RECEIVER OF STOLEN GOODS OR THIEF

Two admitted burglars testified they met at the defendant's home and together laid out a plan, mastermined by the defendant, to burglarize the C. F. & R. Steel Fabricating Co. The two witnesses took various tools from the plant on the night of the burglary, which the defendant had indicated he wanted and would purchase, and which he did in fact purchase. Defendant was convicted of receiving stolen goods and sentenced to life imprisonment as a habitual criminal. Among the errors claimed by the defendant on appeal was that the thieves of the stolen property received by him were accomplices to that crime and that it was error to submit the case to the jury on their uncorroborated testimony. *Held,* the receiving of stolen goods, knowing them to have been stolen, is a crime distinct from the original larceny and the party committing larceny is not the accomplice of one who purchases from him, his testimony is therefore not subject to the infirmities normally attached to accomplice testimony. The test to be applied is whether the witness himself could be indicted for the offense with which the defendent is charged; thus, one who admits theft cannot at the same time be charged with knowingly receiving stolen goods. *Burns v. People,* 365 P. 2d 698 (Colo. 1961).

As long ago as 1873 the Colorado Supreme Court recognized by way of dicta what was referred to even then as a well established principle, that courts will generally advise a jury not to convict on the uncorroborated testimony of an accomplice and that when corroboration is lacking, omission of an instruction cautioning the jury on the credibility of an accomplice is reversible error.[1] On more than one occasion, trial court convictions have in fact been reversed for failure to tender such cautionary instructions.[2] Of course, it is also recognized that where accomplice testimony is supported by other witnesses and circumstances, failure to give the cautionary instruction is not a ground for reversal.[3] The Colorado Supreme Court has also held, however, that where the trial court gave a cautionary instruction there may be conviction upon the testimony of the accomplice, uncorroborated, if it is clear and convincing, received with great caution, and shows guilt beyond a reasonable doubt.[4] Rulings similar to these have also obtained

---

1 Solander v. People, 2 Colo. 48 (1873). See also Klink v. People, 16 Colo. 467, 27 Pac. 1062 (1891); Roberts v. People, 11 Colo. 213, 17 Pac. 637 (1888).

2 *E.g.,* O'Brien v. People, 42 Colo. 40, 94 Pac. 284 (1908).

3 Solander v. People, *supra* note 1. *Accord,* Wilkins v. People, 72 Colo. 157, 209 Pac. 1047 (1922), where the trial court refused to give a cautionary instruction. See also, Miller v. People, 92 Colo. 481, 21 P.2d 1119 (1933), where there was a vigorous dissent in favor of cautionary instructions regardless of outside corroboration.

4 Hoffman v. People, 72 Colo. 552, 212 Pac. 848 (1923). *Accord,* Mendelsohn v. People, 143 Colo. 397, 353 P.2d 587 (1960); Schechtel v. People, 105 Colo. 513, 99 P.2d 968 (1940); People v. Boutcher, 89 Colo. 497, 4 P.2d 910 (1931); Hamilton v. People, 87 Colo 307, 287 Pac 651 (1930).

uniformly in the Tenth Federal Circuit,[5] and in other federal courts.[6]

With this background in mind, it must be understood that *Burns v. People* is certainly not intended to stand for a departure from these well established principles. The problem, as the case clearly indicates, is whether the rules as to the credibility of accomplice testimony are to be applied where the uncorroborated testimony of the thief is the basis of a conviction for receiving stolen goods; in other words, whether the one who stole the merchandise is an accomplice of the one who knowingly received that same merchandise. Previous to the principal case, there existed only two supreme court decisions in Colorado on this precise point of law. In the first, *Newman v. People*,[7] the facts were similar to the *Burns* case in that the defendant had been convicted of buying and receiving fourteen bars of bullion belonging to a railroad, the evidence against him being the uncorroborated testimony of the boys who had committed the larceny. The defendant Newman appealed his conviction, citing as error the trial court's failure to give a cautionary instruction as to this testimony. The supreme court affirmed the conviction, holding that receiving stolen goods is a distinct crime from the original larceny, and the party committing the larceny is not an accomplice of one who knowingly purchases the stolen goods from him.

Only four years later, in *Moynahan v. People*,[8] the supreme court reversed a conviction for receiving stolen goods on the basis of the trial court's refusal to caution the jury as to the testimony of the thief of the stolen property. The court unequivocally held that a person who knowingly sells stolen goods is an accomplice

5 *E.g.*, Arnold v. United States, 94 F.2d 499 (10th Cir. 1938), where a mail theft conviction was reversed on the ground that the district court had not instructed the jury to receive the testimony of an accomplice with caution, and where it was also recognized that although subject to being received with caution, a conviction could be had on such testimony without corroboration. *Accord*, Hall v. United States, 109 F.2d 976 (10th Cir. 1940). See also, Reger v. United States, 46 F.2d 38 (10th Cir. 1931), where it was held that there is no requirement for the district court to instruct that the testimony of an accomplice must be corroborated before it is sufficient for conviction, and that the cautionary instruction given was sufficient. *Accord*, Johns v. United States, 227 F.2d 374 (10th Cir. 1955).

6 United States v. Glassner, 116 F.2d 690 (7th Cir. 1941); Rossi v. United States, 9 F.2d 362 (8th Cir. 1925).

7 55 Colo. 374, 135 Pac. 460 (1913).

8 63 Colo. 433, 167 Pac. 1175 (1917).

of the buyer, because the seller aids and abets in the commission of that crime. Also recognized in the decision were what the court referred to as familar principles of law, that one may be both a principal and an accomplice by doing separate and distinct acts with the same property, and that in any crime where participation of an individual has been criminally corrupt he is an accomplice. No mention whatsoever was made in this decision of the *Newman* case, and so the two diametrically opposed decisions stood.

The clearly opposite results reached in the two early Colorado cases are both typical and representative of the conflict which presently exists on this problem throughout the American jurisdictions.[9] The *Burns* case may be said to have adopted the majority rule,[10] that the testimony of the thief against the receiver is not subject to the infirmities which attach to accomplice testimony. Jurisdictions which have so held reason basically that the existence of accomplice status requires proof that two persons are punishable for the same offense, and that the theft and receipt of stolen property are separate crimes.[11] The minority position, as represented by the holding in the *Moynahan* case in Colorado, is of course diametrically opposed in holding the thief an accomplice of the receiver of stolen goods and his testimony subject to a cautionary instruction. Jurisdictions which follow this point of view base their decisions on what are considered broad or liberal definitions of accomplice, or on a broad definition of principal.[12]

In addition to the majority and minority views, there appears to be a third position taken in a number of jurisdictions which normally hold that the thief and receiver do not bear accomplice status—the majority view. This third approach arises as an exception to the majority rule in cases where there is evidence of a conspiracy or plan between the two parties.[13] In such cases there is deemed a unity of criminal acts in such a manner that the two are held to be accomplices, at least as far as the rules of evidence as to accomplice testimony are concerned; thus, rules as to corrobor-

---

9 For a complete discussion, see Annot., 53 A.L.R.2d 812 (1957).

10 *Id.* at 826.

11 *E.g.*, Springer v. State, 102 Ga. 447, 30 S.E. 971 (1897), one of the early definitive decisions on this point of view. In that case it is reasoned that participation in the same criminal act and in the execution of a common criminal intent is necessary to render one criminal an accomplice of another, in the legal sense of that term; and that the actual thief, relative to the receiver of stolen goods, is an independent criminal who does not and cannot participate with the receiver of such goods in the special offense committed by the latter. And, State v. Kuhlman, 152 Mo. 100, 53 S.W. 416 (1899), another of the frequently cited early cases, where it was held that one who bears the relation of an accomplice is a principal in the first degree and is liable to be charged and punished in the same manner as the principal, but that the thief of stolen goods would be chargeable only with a crime distinct from that of receiving stolen goods. The court drew the analogy that the receiver of stolen goods could not be convicted of larceny.

12 An excellent and exhaustive discussion of the minority view is contained in People v. Coffey, 161 Cal. 433, 119 Pac. 901 (1911). Briefly, the California court decided that because one cannot be convicted of the same offense for which the accused is charged does not prevent him from being an accomplice within the rules governing accomplice testimony. It was reasoned that the test of whether one is or is not an accomplice is simply whether his participation in the offense is criminally corrupt; and that by all authority every person of legal responsibility who knowingly and voluntarily co-operates with or aids, or assists, or advises, or encourages another in the commission of a crime is an accomplice. The decision goes on to point out a false premise in the other view, that an accomplice is one who can be charged with the same crime as the person on trial, the fallacy being that one is an accomplice because of the part played in a crime and not because he may be indicted as a principal. The court also pointed out that many states hold that all accomplices may be indicted as principals, but to hold as a result that if a person cannot be indicted as a principal he is not an accomplice, is fallacious reasoning. It was held that wherever the commission of a crime involves the co-operation of two or more people, the guilt of each is to be determined by the nature of his co-operation, and whenever the co-operation of parties is corrupt they are always accomplices.

13 See Annot., 53 A.L.R.2d 838, 839 (1957).

ation and cautionary instructions are applicable.[14] It is interesting to note that California, champion of the minority view in *People v. Coffey*,[15] may recently have switched its approach to this so-called majority exception, or at least recognized it and in fact followed its reasoning.[16] The result, of course, is the same.

Some of the jurisdictions which have found the thief to be an accomplice of the receiver of stolen goods, in support of what has been called the minority view, have called into use various statutes which define principal or accomplice in a somewhat broad sense.[17] Such statutes have been directly used in this connection in Nebraska,[18] Utah[19] and in Wyoming.[20] In fact, Colorado has just such a statute, which defines an accessory as one who aids, abets, assists or advises and encourages the perpetration of a crime and provides that such a person is to be deemed a principal and punished accordingly.[21] The Colorado Supreme Court uniformly construed this statute to mean precisely what it says.[22] Most interesting in this connection is a 1933 decision which states that if one agrees in advance to buy stolen property, knowing that the property is to

14 *E.g.*, Stephenson v. United States, 211 F.2d 702 (9th Cir. 1954), perhaps the leading case on this exception, where it was held that the exception should be invoked when the thief and the receiver enter into an agreement prior to the larceny for one to steal and the other to buy. The decision reasoned that this previous arrangement amounts to a conspiracy for both the theft and receipt so that the usual (majority) test for determining an accomplice is met since the thief and receiver can be prosecuted for both the theft and receipt of stolen property. For a similar result see State v. McNight, 129 Mont. 8, 281 P.2d 816 (1955), where the court admitted that Montana had followed the rule that a thief cannot receive from himself and thus cannot be an accomplice of the receiver of stolen goods, but held that such a rule should be limited to cases where the thief did not participate with the receiver in subsequent acts which pertain to the crime of receiving stolen property. *Accord*, State v. Harmon, 135 Mont. 227, 340 P.2d 128 (1959), where the court defined an accomplice as one who knowingly, voluntarily, and with common intent with the principal offender unites in the commission of a crime.

15 See note 12 *supra*.

16 See People v. Lima, 25 Cal.2d 573, 154 P.2d 698 (1944).

17 *E.g.*, Ing v. United States, 278 F.2d 362 (9th Cir. 1960), which employed an Alaska statute defining principals as all persons concerned in the commission of a crime, felony or misdemeanor whether they directly commit an act constituting a crime or aid and abet in its commission, and providing that all such persons are to be tried and punished as principals.

18 Neiden v. State, 120 Neb. 619, 234 N.W. 563 (1931).

19 State v. Coroles, 74 Utah 94, 277 Pac. 203 (1929).

20 State v. Callaway, 72 Wyo. 509, 267 P.2d 970 (1954). The court in this case made an interesting observation when it said the reasoning, that intent is a necessary element of receiving stolen goods and thus there can be no intent to unlawfully receive that which a thief already has, is insufficient because the criminal intent necessary to make one an accessory to receiving lies not in a criminal intent that the accessory knowingly receive, but rather in criminal intent to aid and abet another in his commission of the crime. In addition, for a combination of the broad definition of accomplice approach and the conspiracy exception approach, see Collins v. State, 169 Tenn. 393, 88 S.W.2d 452 (1935), where it was reasoned that a thief who delivers stolen goods to another is an aider and abettor of the receiver and thus also guilty of that offense, *especially* where the thief stole the goods under prearrangement with the defendant for delivery to him.

21 Colo. Rev. Stat. §40-1-12 (1953).

22 See Block v. People, 125 Colo. 36, 240 P.2d 512 (1951); Bacino v. People, 104 Colo. 229, 90 P.2d 5 (1939).

be stolen, he thereby encourages the perpetration of the theft, and if the crime is committed he is deemed and considered a principal.[23] This situation is merely the reverse of that represented in the principal case, and yet it would certainly seem that the results are quite different, in fact, opposite. Perhaps this is still another departure in Colorado law that requires reconsideration and reconciliation with the latest approach of the supreme court.

The decision in the principal case serves a valuable purpose by clearly resolving the pre-existing conflict in Colorado law, as the court expressly adopts the holding and reasoning of the *Newman* case. As indicated, this may be considered the majority view, but there is substantial ground for feeling that it is not necessarily the modern view. In this respect, reference should be made once again to the very sound reasoning of those jurisdictions which have adopted the conspiracy exception to the rule that the thief is *not* an accomplice of the receiver.[24] There can be little doubt that a conspiracy did in fact occur in the principal case. It is submitted that the supreme court either missed or purposely passed up a chance to adopt a better reasoned viewpoint for the case at bar, and yet still reach a decision in favor of the majority rule in general, that is, where no conspiracy exists. The decision seems also to require speculation as to the place of the Colorado statute defining accessory. This is of particular interest in view of the *Miller* case, as previously mentioned.[25] In addition, it is submitted that the arguments tendered by jurisdictions favoring the position that the thief *is* an accomplice of the receiver contain some extremely interesting and compelling reasoning.[26] Notwithstanding these considerations, at least the law in Colorado is now settled after a good many years of quiet but serious conflict.

Donald S. Perlmutter

23 Miller v. People, 92 Colo. 481, 22 P.2d 626 (1933).
24 See Stephenson v. United States, note 14 *supra*.
25 See note 23 *supra*.
26 See People v. Coffey, note 12 *supra*.

OPINION NO. 25 OF THE ETHICS COMMITTEE OF THE COLORADO BAR ASSOCIATION ADOPTED AUGUST 25, 1962

SYLLABUS

It is unethical for a lawyer to consent to or acquiesce in an arrangement whereby his name or signature appears on a summons as attorney when the summons is in fact prepared by his client, a collection agency, and not under his direction and control.

FACTS

An attorney represents a collection agency. The collection agent frequently finds it necessary to file suit on claims assigned to it. Lay employees of the agency, with the consent of the attorney, prepare the Justice Court summons in each such case within that court's jurisdiction and cause the attorney's name or signature to be placed on the summons, together with the telephone number of the agency. Defendants in the cases frequently call the number shown on the summons purporting to be the attorney's number and lay employees answering such calls fail to disclose the fact that they are not attorneys and instead give the impression that it is the attorney's office that has been contacted. The attorney representing the agency has no knowledge of the case at all until just prior to the time it goes on trial. A substantial portion of the cases are settled before such time and consequently never come to the attention of the attorney.

Is the attorney in violation of the Canons of Ethics?

OPINION

The attorney is in violation of the Canons of Ethics.

The collection agency is practicing law in the preparation of the summons and subsequent negotiations with the respective defendants. The attorney has allowed his name to be used by a lay agency in direct violation of Canon 35 (prohibiting lay intermediaries) and Canon 47 (aiding the unauthorized practice of law.)

Furthermore, Canon 9 may also be involved, since it provides in part that "it is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him as to the law." The lawyer has consented to an arrangement tending to mislead defendants in the cases filed by the collection agency. The actions or statements of the lay employees of the agency in dealing with a defendant after a suit is filed (purportedly by the lawyer) are beyond the knowledge or control of the lawyer, and this very fact is sufficient to condemn the arrangement under Canon 9.

The lawyer is also in violation of Canon 22 requiring candor and fairness in dealings with courts and other lawyers. The filing

of a summons showing the lawyer's name is a representation not only to the defendant but to the Court that the lawyer has knowledge of the case and that the summons was drawn by him or drawn under his direction and control.

We, therefore, conclude that the conduct of the lawyer is unethical. The mere acquiescence by the lawyer is an arrangement whereby his name or signature appears on pleadings or other documents not prepared by him, and not under his direction and control, is sufficient without other facts to render the conduct unethical. Although not directly in point, we refer for instructive purposes to our prior Opinion No. 7 regarding the relationship between attorneys and collection agencies. See also Opinion No. 35 of the American Bar Association Ethics Committee.

OPINION NO. 26 OF THE ETHICS COMMITTEE OF THE COLORADO BAR ASSOCIATION ADOPTED SEPTEMBER 28, 1962

SYLLABUS

An attorney who is executor or administrator of an estate or who is attorney for an estate may not ethically charge or receive or participate in a commission on the sale of real estate or other assets of the estate whether or not he has a real estate broker's or agent's license.

FACTS

An attorney is the executor or administrator of an estate or is attorney for the estate. In settlement of the estate, real estate or other assets belonging to the estate are sold. May the attorney, who has, or is connected with someone who has, a real estate broker's or agent's license receive or participate in a commission on the sale?

OPINION

An executor or administrator of an estate, whether lawyer or layman, is forbidden to so deal with the assets of the estate that he makes a personal profit out of such dealings, whether such profit depletes the estate or not—*In re Macky's Estate,* 73 Colo. 1, 213 P. 131 (1923). In the *Macky* case it was held that an executor could not receive a commission on premiums paid for his bond as executor.

In *Murray vs. Stuart,* 79 Colo. 454, 247 P. 187 (1926), directly in point, it was held that an administrator who participated in the sale of realty belonging to an estate could not lawfully charge or collect a commission on the sale, even though it was agreed the commission would be paid. The Court held that this agreement was contrary to public policy inasmuch as it was in breach of the administrator's trust.

As a fiduciary, an executor or administrator occupies a position of trust and confidence and is held to the highest degree of good faith. The purpose of the rule forbidding a fiduciary to profit personally from his dealings with the assets entrusted to him is to prevent both the fact and the appearance of fraud and breach of the confidential relationship.

The lawyer, who is enjoined from any conduct involving disloyalty to the law and is held to the utmost fidelity to private and public duty by Canon 32, and who is required by Canon 29 at all times to uphold the honor and maintain the dignity of the profession, is no less bound to observe the law and appearances than the lay fiduciary.

Therefore, the lawyer, acting as executor or administrator, may not receive or participate in a commission on the sale of estate assets.

The rationale of the above applies just as strongly to the attorney for an estate. He is in no less a confidential position with regard to his client than is an executor or administrator with regard to the beneficiary of an estate. To hold otherwise and to permit a lawyer for an estate to receive or participate in commissions for dealing with estate properties or interests when he is not permitted to do so as executor or administrator would be to hold that a lesser degree of fidelity to his trust is required of a lawyer acting as such than is required of the same lawyer acting in the lay position of executor or administrator. To state the proposition is to refute it.

Canon 11 provides in part:

> Money of the client or collected for the client or other trust property coming into the possession of the lawyer should be reported and accounted for promptly, and should not under any circumstances be commingled with his own or be used by him.

Therefore, any commission coming to a lawyer for an estate as the result of his dealing with estate property is trust property belonging to the estate and must be turned over to it.

INDEX TO VOLUME 39

INDEX TO AUTHORS OF LEADING ARTICLES

INDEX TO AUTHORS OF STUDENT NOTES

INDEX TO AUTHORS OF CASE COMMENTS

TITLE INDEX TO LEADING ARTICLES AND STUDENT NOTES

INDEX TO BOOKS REVIEWED

TABLE OF CASE COMMENTS

TOPIC INDEX

(*Leading Articles or Bar Briefs, N—Student Note, CC—Case Comment)